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Legal
History

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THE
HISTORY
OF THE
Common Law of England.

BY
SIR MATTHEW HALE.

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THE
HISTORY
OF THE
Common Law of England,
AND
AN ANALYSIS
OF
THE CIVIL PART OF THE LAW ;
BY
SIR MATTHEW HALE.
THE SIXTH EDITION,
with additional
NOTES & REFERENCES;
AND
SOME ACCOUNT OF THE LIFE OF THE AUTHOR,

BY CHARLES RUNNINGTON,
SERJEANT AT LAW.

*Of Law no less can be acknowledged, than that her seat is the bosom of God ; her
voice the harmony of the world ; all things in heaven and earth do her homage ;
the very least, as feeling her care, and the greatest, as not exempted from her
power.*
HOOKER.

LONDON :
PRINTED FOR HENRY BUTTERWORTH, LAW-BOOKSELLER,
7, FLEET-STREET,
BETWEEN THE TEMPLE GATES.
1820.

Rogers, Red-Lion-Street,
Clerkenwell, London.

P R E F A C E.

THOUGH the approbation of Sir MATTHEW HALE, was of itself, sufficient to insure success to any production, yet this History was dismissed from the closet, without soliciting indulgence by a prefatory discourse, or claiming respect from the authority of his name^(a). It were needless to mention the rapid success which attended, or the generous applause which was bestowed on its publication; in truth it has ever been justly held in the highest estimation; and, like the virtue of its author, been universally admired. Here the student finds a valuable guide;—the advocate a learned assistant;—the court an indisputable authority. The impossibility of adding to

(a) The title-page to the first edition was—"The History of the Common Law of England.—Divided into Twelve Chapters.—Written by a learned hand."—Published in 1713.

P R E F A C E.

its celebrity cannot but be acknowledged. I have only to hope, (vain as the hope may be,) that my labours may promote inquiry and reward attention; for (without assuming the merit of even diligence or accuracy) I can with truth assert, that I have applied the utmost of my ability, faithfully to execute the task of Editor.

C. RUNNINGTON.

ADVERTISEMENT
TO THE FIFTH EDITION.

SINCE the publication of the fourth edition of this work, the EDITOR has endeavoured to make his labours less reprehensible. He frankly confesses, that, on revision, he found some parts requiring emendation, and others capable of improvement. Many faults he has corrected, and some deficiencies he has supplied. In truth, though the additions are considerable, he trusts that the Profession, in its candour, will not think they have been improvidently accumulated.

SERJEANTS' INN, May 1, 1794.

ADVERTISEMENT
TO THE SIXTH EDITION.

THE variety of important publications which have been circulated, since the year 1794, have necessarily increased the notes to this Edition ; particularly Mr. Hallam's View of the Middle Ages ; a work to which the Editor feels himself under the highest obligations, and which he cannot but recommend to the diligent attention of the English student. Note (A), in Chap. III. p. 55. on Parliamentary Impeachment, has been somewhat abridged ; and Note (A), in Chap. IX. p. 220. on Ireland, considerably enlarged.

March, 1820.

SOME ACCOUNT
OF THE
L I F E
OF
SIR MATTHEW HALE.

——— *quid virtus, et quid sapientia possit,
Utile proposuit nobis exemplar.* ——— Hon. Epist.

SIR MATTHEW HALE was born at Alderley, in Gloucestershire, on the first of November 1609. In the seventeenth year of his age, he was entered of Magdalen-hall, Oxford; and on the 8th of November 1629 was admitted of Lincoln's-Inn; where, if the authority of Burnet may be relied on, he studied for many years sixteen hours a day (a). Be that as it may, the diligence with which he pursued his studies, is evident from his acquirements. The jurisprudence of his own country, though the first, was by no means the sole object of his attention. He applied himself with great avidity, to the study of the Roman law; and though he preferred the mode of trial by jury, to that of the civilians, (who intrust too much to the judge,) yet he often affirmed, that

(a) The human mind is incapable of such exertion for any great length of time. A milder mode meets with the approbation even, of the laborious Sir Edward Coke.—Co. Lit. 64. b. And so as to Sir Matthew Hale himself, who thought six hours a day, with attention and constancy, sufficient. See Bosw. Life of John. 47. oct. 334, and post. viii.

the principles of jurisprudence, were so well delivered in the Digests, that law could not be understood as a science, without first resorting to them for information. This may, with deference, be doubted. Admitting that the knowledge of the civil law, has deservedly been considered, as no small acquisition to the English student, yet is it, in reality, essential to the understanding of our own municipal system, which requires no assistance from any foreign code, however admirable or however just? "We must not carry our veneration so far, as to sacrifice our Alfred and Edward, to the manes of Theodosius and Justinian; we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament, unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridian the former were calculated, to the free Constitution of Britain, which the latter are adapted to perpetuate (*b*)."

Great improvement is, in general, the result of intense application. HALE, in the course of a few years, had obtained not only a high professional reputation, but was allowedly well versed in scholastic knowledge. That he was perfectly conversant with the discoveries of the age in which he lived, is evident from the treatise which he wrote on the rarefaction and condensation of air; a treatise which shews as great accuracy, and as much subtilty, as the principles to which he adhered would admit. Ancient history, chronology, and philosophy, amused him in the moments of relaxation; and, through his intimacy with Mr. Selden, he is said, to have made some progress in rabbinical learning.

Where different sciences are pursued at the same time, if one be abstracted and unpleasant, the other

(*b*) Blac. Com. oct. vol. i. p. 5; and see the remark of Mr. Dugald Stewart, and progress of the present establishments in Europe, in the Life of Dr. Robertson, 2 vo. 224.

should be less abstruse and more entertaining; for when pleasure succeeds the labour of application, the fatigue of meditation is borne with undisturbed tranquillity:--thus while a dull and heavy hour, is relieved by some alluring employment of the mind, diversion enriches the understanding, and pleasure is turned to advantage. Such was the opinion of HALE, who, when wearied with studying either law or divinity, would, to use his own words, "recreate himself with philosophy or mathematics." In his opinion, no man could be master of any profession, without having some skill in all the sciences. The mathematics, indeed, reward attention with demonstration, and when pursued with inflexible application, strengthen and enlarge the powers, while they confine the luxuriance of the human mind; but though they render us more scientific, they neither increase our virtue, nor facilitate our happiness. HALE, however proficient in the science, used it only as subservient to more serious avocations.

He seemed particularly attached to the study of divinity; and those who peruse his religious disquisitions, may conclude, that the science of theology had engaged the principal part of his attention. Here it is but justice to remark, that so averse was he from the dissipation of time, that he would not even correspond with his friends, except on necessary business, or matters of learning. Like Boerhaave, he lost none of his hours, but, when he had attained one science, attempted another. In short, he made every human aid contribute in advancing him, to a superior degree, of knowledge and of wisdom. Every thing connected with the applications of so exalted a mind cannot but be interesting; the following account, therefore, of his method of study, is transcribed from a MS. in the hand-writing of a gentleman, who studied the law under his direction.

Mr. Bennet Langton, the friend of the late Dr. Johnson, permitted Mr. Seward, to copy from a MS. in the

hand-writing of Mr. Langton's great grandfather, who studied the law under the direction of Sir Matthew Hale; and Mr. Seward has published it in his *Anecdotes of Distinguished Persons* (c).

" Dec. 13--72. I was sent to by Mr. Barker to come
" to him to my Lord Chief Justice Hale's lodgings at
" Serjeants'-Inn.

" I was informed by Mr. Godolphin about a month
" ago, that my Lord Chief Justice had declared at supper,
" at Mr. Justice Twisden's, that if he could meet with a
" sober young man that would entirely addict himself to
" his Lordship's direction, that he would take delight to
" communicate to him, and discourse with him at meals,
" and at leisure times, and in three years time make him
" perfect in the practice of the law. I discoursed several
" times with Mr. Godolphin of the great advantage that
" a student would make, by his Lordship's learned com-
" munication, and what influence it would have on a
" practiser, as well as honour to be regarded as my Lord's
" friend, and persuaded him to use his interest, and the
" offers of his friends to procure his Lordship's favour.
" But his inclinations leading him to travel, and his
" designs afterwards to rely upon his interest at court, he
" had no thoughts to pursue it, but offered to engage
" friends on my behalf, which I refused, and told him I
" would make use of no other person, than my worthy
" friend Mr. Barker, whose acquaintance with my Lord
" I knew was very particular. After I had often reflected
" upon the nobleness of my Lord's proposition, and the
" happiness of that person who should be preferred by so
" learned and pious a man, to whose opinion every court
" paid such a veneration, that he was regarded as the
" oracle of the law, I made my application to Mr. Barker
" to intercede with my Lord in my behalf, who assented
" to it with much readiness, as he always had been very

“obliging to me, since I had the honour to be known to
“him. He made a visit to my Lord, and told him that
“he heard of the declaration my Lord made at Mr. Jus-
“tice Twisden’s. My Lord said ’twas true, and he had
“entertained the same resolution a long time, but not
“having met with any body to his purpose, he had dis-
“carded those thoughts, which Mr. B. did beg of his
“Lordship to resume in behalf of a person that he would
“recommend to him, and would be surety for his industry,
“and diligent observation of his Lordship’s directions.
“My Lord then inquir’d who it was, and he mentioned
“me. Then he asked how long I had been at the law,
“of what country I was, and what estate I had, which he
“told him, and that I was my father’s eldest son. To
“which he replied, that he might talk no farther of it,
“for there was no likelihood that I would attend to the
“study of the law as I ought: but Mr. B. gave him
“assurances that I would, that his Lordship might rely
“upon his word, and that I had not taken this resolution
“without deliberation; that I had often been at West-
“minster Hall, where I had heard his Lordship speak,
“and had a very great veneration for his Lordship, and
“did earnestly desire this favour: That my father had
“lately purchased the seat of the family, which was sold
“by the elder house, and by that means had run himself
“into 5 or 6,000*l.* debt.

“Well then,” said my Lord, “I pray bring him to
“me.”

“Dec. 13. I went to my Lord and Mr. B. (for till
“that time my Lord was either busie, or out of town)
“about four in the afternoon. My Lord prayed us to
“sit, and after some silence, Mr. B. acquainted my Lord
“that I was the person on whose behalf he had spoken to
“his Lordship. My Lord then said, that he understood
“that I had a fortune, and therefore would not so strictly
“engage myself in the crabbed study of the law as was

“ necessary for one that must make his dependence upon
“ it. I told his Lordship, that if he pleased to admit me
“ to that favour I heard he designed to such a person he
“ enquired after, that I should be very studious. My
“ Lord replied quick that Mr. B. had given him assurances
“ of it, that Mr. B. was his worthy friend, with whom he
“ had been acquainted a long time, and that for his sake,
“ he should be ready to do me any kindness; for which
“ I humbly gave his Lordship thanks, as did likewise
“ Mr. B. My Lord asked me how I had passed my time,
“ and what standing I was of. I told him that I was
“ almost six years of the Temple, that I had travelled
“ into France about two years ago, since when I had dis-
“ continued my studies of the law, applying myself to the
“ reading French books, and some histories. My Lord
“ discoursed of the necessity of a firm uninterrupted
“ prosecution of that study, which any man designed—
“ in the midst of which, Mr. Justice Twisden came in,
“ so that his Lordship bid us come to him again two hours
“ after.

“ About eight the same evening we found his Lordship
“ alone. After we sat down, my Lord bid me tell him
“ what I read in Oxford, what here, and what in France.
“ I told him I read Smith’s Log. Burgersdicius’s Nat.
“ Phil. Metaphysics and Moral Philosophy; that in the
“ afternoons I used to read the classic authors: That at
“ my first coming to the inns of court, I read Littleton,
“ and Doctor and Student, Perkins, my Lord Coke’s In-
“ stitutes, and some cases in his Reports. That after I
“ went into France, I applied myself to the learning of
“ the language, and reading some French memoirs, as the
“ Life of Mazarine, Memoirs of the D. of Guise, the
“ History of the Academy Fr. and others; that since I
“ came away, I continued to read some French books, as
“ the History of the Turkish Government by ———, the
“ Account of the last Dutch War, the State of Holland, &c.

“ That I read a great deal in Heylin’s Georg. some of
“ Sir Walter Raleigh, my Lord Bacon of the Advance-
“ ment of Learning, Tully’s Offices, Rushworth’s Col-
“ lections.

“ My Lord said that the study of the law, was to one
“ of these two ends ; first, to fitt a man with so much
“ knowledge as will enable him to understand his own
“ estate, and live in some repute among his neighbours in
“ the country ; or secondly, to design the practice of it
“ as an employment to be advantaged by it ; and asked
“ which of them was my purpose. I acquainted his
“ Lordship that when I first came to the Temple, I did
“ not design to prosecute the study of the law, so as to
“ make advantage by it ; but now, by the advice of my
“ father, and my uncle, and Dr. Peirse, in whose college
“ I had my education, and received many instances of his
“ great kindness to me, I had resolutions to practise it,
“ and therefore made my suit to his Lordship for his
“ directions.

“ Well, said my Lord, since I see your intentions, I
“ will give what assistance I can.

“ My Lord said that there were two ways of applying
“ one’s self to the study of the law : one was to attain the
“ great learning and knowledge of it which was to be had
“ in all the old books ; but that did require great time,
“ and would be at least seven years before a man would
“ be fit to make any benefit by it : the other was, by
“ fitting one’s self for the practice of the court, by read-
“ ing the new reports and the present constitution of the
“ law ; and to this latter my Lord advised me, having
“ already passed so much time, a great many of the cases
“ seldom coming in practice, and several of them anti-
“ quated.

“ In order to which study his Lordship did direct that
“ I should be very exact in Littleton, and after, read care-
“ fully my Lord Coke’s Littleton, and then his Reports.

“ After which, Plowden, Dier, Croke, and More. That
“ I should keep constantly to the exercises of the House,
“ and in term to Westminster Hall to the King’s bench,
“ because the young lawyers began their practice there.
“ That I should associate with studious persons rather
“ above than below my standing ; and after next term get
“ me a common-place book ; and that I must spoil one
“ book, binding Rolles’ Abr. with white paper between
“ the leaves, and according to those titles insert what I
“ did not find there before, according to the preface to
“ that book, which my Lord said came from his hands,
“ and that he did obtain of Sir Francis Rolles to suffer it
“ to be printed to be a platforme to the young students.
“ My Lord said he would at any time that I should come
“ to him, shew me the method he used, and direct me,
“ and that if he were busy he would tell me so.

“ He said that he studied sixteen hours a day, for the
“ first two years that he came to the inns of court, but
“ almost brought himself to his grave, though he were of
“ a very strong constitution, and after reduced himself to
“ eight hours ; but that he would not advise any body to
“ so much ; that he thought six hours a day, with atten-
“ tion and constancy, was sufficient ; that a man must use
“ his body as he would use his horse, and his stomach, not
“ tire him at once, but rise with an appetite. That his
“ father did order in his will, that he should follow the
“ law ; that he came from the University with some
“ aversion for lawyers, and thought them a barbarous sort
“ of people, unfit for any thing but their own trade ; but
“ having occasion to speak about business with Serjeant
“ Glanvil, he found him of such prudence, and candour,
“ that from that time he altered his apprehensions, and
“ betook himself to the study of the law, and oft told
“ Serjeant Glanvil, that he was the cause of his application
“ to the law.

“ That constantly after meals, every one in their turns

“ proposed a case, on which every one argued. That he
“ took up a resolution which he punctually observed ever
“ since, that he would never more see a play, having
“ spent all his money on them at Oxford, and having ex-
“ perienced that it was so great an alienation of his mind
“ from his studies by the recurring of the speeches and
“ actions into his thoughts, as well as the loss of time,
“ when he saw them : that he had often disputes with
“ Mr. Selden, who was his great friend, and used to say,
“ he found so great refreshment by it ; but my Lord told
“ him he had so much knowledge of the inconvenience of
“ them, that he would not see one for 100*l*. But he said
“ he was not of Mr. Prynne’s judgment (which I minded
“ him of) for he did not think it unlawful, but very fit for
“ gentlemen sometimes, but not for students.

“ My Lord said at the beginning of his discourse, that
“ my friends might expect that I should marry, to take
“ off the present debt from the estate, which else would
“ encrease, and then there could be no thoughts of a very
“ earnest prosecution of study ; to which Mr. B. said that
“ my father, when he made this purchase that put him
“ into debt, did resolve to sell other land, and by that
“ might either discharge or lessen it.

“ My Lord said that his rule for his health was to be
“ temperate, and keep himself warm. He never made
“ breakfasts, but used in the morning to drink a glass of
“ some sort of ale. That he went to bed at nine, and
“ rose between six and seven, allowing himself a good
“ refreshment for his sleep. That the law will admit of
“ no rivall, nothing to go even with it, but that sometimes
“ one may for diversion read in the Latin Historians of
“ England ; Hoveden, and Matthew Paris, &c. But after
“ it is conquered, it will admit of other studies.

“ I asked whether his Lordship read the same law in
“ the afternoon as he did in the morning. He said, No ;
“ He read the old books in the morning, and the new in

“ the afternoon, because of fitting himself for conversation. I asked if he kept constantly to one court, which he said he did.

“ He said, a little law, a good tongue, and a good memory, would fit a man for the Chancery ; and he said it was a golden practice, for the lawyers there got more money than in all the other Courts in Westminster Hall. I told his Lordship what my Lord Chancellor lately said, that he would reduce the practice of the Court to another method, and not suffer above one counsel, or two at the most in one cause.

“ My Lord said that 1,000*l.* a year was a great deal for any common lawyer to get; and Mr. B. said that Mr. Winnington did make 2,000*l.* per year by it. My Lord answered that Mr. W. made great advantage by his city practice, but did not believe he made so much of it. I told his Lordship of what Mr. W. had said before the Council on Wednesday, on the behalf of the stage coaches which were then attempted to be overthrown. At our coming away my Lord did reiterate his willingness to direct and assist me; and I did beg of his Lordship that he would permit me to consult his Lordship in the reason of any thing that I was ignorant of, and that his Lordship would be pleased to examine me in what I should read, that he might find in what measure I did apply myself to the execution of his commands, to which he readily assented.”

Soon after his appearance at the bar, the Civil War commenced; and when the Earl of Strafford and Archbishop Laud, (who had espoused the cause of Charles I.) were tried, he was assigned counsel to those unfortunate noblemen (*d*). He had afterwards the honour of being

(*d*) Burnet affirms that he was retained for Strafford and Laud, yet it does not by the trial appear, that Hale was retained for the earl, whose counsel were Mr. Lane, Mr. Gardiner, Mr. Loe, and Mr. Lightfoot, Stat. Tr. vol. i. p. 759. Hale attended as counsel for his grace, and in the conduct of that important cause was assisted by Mr. Hern and Mr. Gerard. The former

assigned to officiate in that character for the king himself; but was not in this instance permitted to plead, because Charles had refused to submit to the jurisdiction, which had assumed the power of trying him.

The brief recital of the trial of a sovereign, in whose defence, it may rationally be supposed, HALE was, from principle interested, added to a conjecture, not altogether improbable, that he furnished the objections which Charles so pointedly applied, will not, it is hoped, obtrude on the attention, or weary the patience, of the reader.

“The dignity of this transaction” (says the philosophic historian) “corresponded to the greatest conception that is suggested in the annals of human kind; the delegates of a great people sitting in judgment upon their supreme magistrate, and trying him for his misgovernment. The solicitor, in the name of the commons, represented, that Charles Stuart, being admitted king of England, and entrusted with a limited power, yet, out of a wicked design to erect an unlimited government, had traitorously levied war against the parliament, and the people whom they represented, and was therefore impeached as a public and implacable enemy to the commonwealth. After the charge was finished, the president (serjeant Bradshaw) directed his discourse to the king, and told him that the court expected his answer.

“The king, though long detained a prisoner, and now produced as a criminal, sustained the majesty of a monarch. With great dignity he declined the authority of the court, and refused to submit himself to its jurisdiction. He represented, that, having been engaged in treaty with his parliament, and having finished almost every article, he had expected to be brought to his

indeed took the lead, and in defence of his client “delivered his argument very freely and stoutly, proving, that nothing which his client had either said or done, according to the charge, “was treason, by any known established law of the kingdom.” This argument was not Mr. Heron’s, but Mr. Hale’s. *Ib.* 938, where the arguments is reported at large.

“ capital in another manner, and to have been restored to
“ his power, as well as to his liberty ; that he could not
“ perceive any appearance of the upper house, so essential
“ a member of the constitution ; and had learned that
“ even the commons, whose authority was pretended, were
“ subdued by lawless force, and were bereaved of their
“ liberty : that he himself was their native, hereditary
“ king ; nor was the whole authority of the state, though
“ free and united, intitled to try him, who derived his
“ dignity from the Supreme Majesty of Heaven : that
“ admitting those extravagant principles which levelled
“ all orders of men, the court could plead no power dele-
“ gated by the people, unless the consent of every indivi-
“ dual, down to the meanest and most ignorant peasant,
“ had been first obtained : that he acknowledged without
“ scruple, that he had a trust committed to him, a trust
“ most sacred and inviolable ; he was entrusted with the
“ liberties of his people, and would not betray them, by
“ recognizing a power founded on the most atrocious
“ usurpation : that having taken arms, and frequently
“ exposed his life, in defence of the constitution, he was
“ willing, in this last and most solemn scene, to seal with
“ his blood those precious rights, for which, though in
“ vain, he had so long contended : that those who arro-
“ gated a title to sit as his judges, were born his subjects,
“ and born subjects to those laws which determined that
“ the king can do no wrong : that he was not reduced to
“ the necessity of sheltering himself under that general
“ maxim, which guards every English Monarch, even the
“ least deserving ; but was able, by the most satisfactory
“ reasons, to justify those measures in which he had been
“ engaged : that, to the whole world, and even to them
“ his pretended judges, he was desirous, if called upon in
“ another manner, to prove the integrity of his conduct
“ and assert the justice of those defensive arms, to which,
“ unwillingly and unfortunately, he had recourse : but

“that, in order to preserve an uniformity of conduct, he must, at present, forego the apology of his innocence; lest by ratifying an authority no better founded than that of robbers and pirates, he be justly branded as the betrayer, instead of being applauded as the martyr, of the constitution (e).”

HALE was also counsel for the duke of Hamilton (f), the lords Holland (g), Capel, and Craven. On the trial of lord Craven, the attorney-general so far neglected his own character, as to threaten him for appearing against government. Regardless of consequences, HALE, with becoming warmth, made some pointed observations on the menace; adding, that nothing should intimidate him, in the discharge of his professional duty towards his noble and unfortunate Client.

His legal qualifications had now rendered him eminently conspicuous, and the rectitude of his conduct had gained him universal esteem. Cromwell, seeing the extent of his practice, knowing the transcendancy of his abilities, and pleased perhaps with the firmness of his character, determined on advancing him to the bench. Incapable of hypocrisy, and unmoved by the honour intended him, HALE, at first, declined to accept the commission. This appeared so extraordinary to Cromwell, that he condescended to require his reasons for refusing so high an office. HALE candidly informed him, that he was not satisfied about his authority, and scrupled there-

(e) Hume, Stat. Tr. vol. i. from folio 986 to 1044. Sir John Dalrymple slightly notices the conduct of the commons against Charles:—"The republican and puritanical commons, with a democratical spirit, brought their sovereign, under the forms of justice, like a common member of the community, to a public trial, and a public execution. With the same levelling hand, they laid the peerage, the church, the parliament, and the law itself, in the dust." Mem. Gr. Br. vol. i. p. 18.

(f) Mr. Chute, Mr. Hale, Mr. Parsons, and Doctor Walker, were assigned counsel for the duke, Stat. Tr. vol. ii. p. 2. See also Dr. Burnet's Memoirs of the Duke of Hamilton, p. 385, &c. and Clarend. Hist. vol. iii. p. 204. 209. —The duke was tried by a new high court of justice as earl of Cambridge in England.

(g) No party lamented the death of the earl of Holland; his ingratitude to the king was a great stain on his memory.

fore to accept the commission. Cromwell, who was a friend to justice, though his public conduct has been said to have been one continued violation of it, replied, that as he had gotten possession of the government, he was resolved to maintain it; "I will not" (continued the Protector,—with what probability the reader will determine, for I cannot vouch for the truth of the relation) "be argued out of it.—It is my desire to rule according to the laws of the land, for which purpose I have pitched upon you; but if you won't let me govern by red gowns, I am resolved to govern by red coats (*h*)."—HALE, commiserating the temper of the times, added to a reflection that justice ought, at all events, to be supported, was on maturest consideration convinced, that nothing criminal could be imputed to the unbiassed instrument of its impartial administration. This reflection, confirmed by the solicitation of his friends, induced him to yield to the proposal of Cromwell. The importunity of the republican was equally urgent. By the promotion of HALE, whose political sentiments were certainly different from their own, they affected to despise every idea of private advantage. To gain popularity, it was insinuated that their importunity only arose from a fervent zeal for the public good. "We will trust (said they) men of eminent virtue, of what persuasion soever respecting political matters." HALE's reverence for right still interposed itself;—he questioned the propriety of his sitting in judgment upon criminals;—conceiving it to be highly improper, if not wholly unjustifiable, to pass sentence under an authority, which was derived from usurpation; however, in 1653 (*i*), he accepted the commission which constituted

(A) I doubt whether at this time the army had any regular uniform; and if they had, that it was scarlet.

does not appear, any where that I can find. See *Observ. on the antiq. and dig. of a Serjt. at Law*, 71, 72.—and *Com. Jour.* 8 vol. 2, 7, 8, 26, 27, &c. where his name appears on Committees, as Serjt. HALE. The following memo-

(i) The precise time when HALE was appointed a Judge, or called a *Serjant*,

him one of the judges of the court of common pleas. In this situation, he took the engagement "to be true and faithful to the common-wealth of England, without a King, or house of lords."---This, in the sense of those, who imposed it, was, in the opinion of Mr. Justice Foster, ("a whig of the old block") (*k*), plainly an engagement for abolishing kingly government, at least for supporting the abolition of it (*l*). In the *rota* of criminal decision, he sat some few times on the crown side; but on further consideration, refused to sit there any more, because, "in matters of blood, he was always to chuse the safer side." The heart of a good man, cannot but recoil, at the thought of punishing a slight injury with death; and he who knows not how often rigorous laws, produce total impunity; and how many crimes are concealed and forgotten, for fear of hurrying the offender to that state in which there is no repentance, has conversed very little with mankind. "And whatever epithets of reproach or contempt this compassion may incur, from those who confound cruelty with firmness, I know not, (says Dr. Johnson,) whether any wise man would wish it less powerful or less extensive."

Within a short time after his preferment, in a cause depending before him, the jury were returned by the express order of Cromwell. Astonished at the atrocity and incensed at the illegality of the act, HALE, with a spirit becoming his character, dismissed the jury, and refused to

randum is taken from Siderf.'s Reports, vol. 1. fo. 3.

Termino Trinitatis Anno 12 Caroli Secundi.

Memorandum que breves le Roy is-
sustal 14. queux fueront fait Serjeants
puis le Roy Car. 1. fuit deprime de son
Regal government par appeller eux *ad
statum et gradum*, &c. in tant que fuit
suppose que leur *primer* title, *ne fait
bien conferre* coment ceo fait per breve
et issint in manner judicial act; et ascun
des breves fueront en nosme del Roy
Car. 1.—(quant il fuit deprime).—Et

ceux breves fueront retournable le pri-
mer jour de cest Terme de Trin. que fuit
22 Junii—a quel jour ils appareo et
feurent jure en le Chauncery. Et le
prochein jour ils veijn en leur voux
Serjeants Robes et Count en le Com-
mon Banke en Francois. Leur nosmes
fueront,—Witherington, Browne, Glyn,
Earle, Barnard, Newdigate, HALE,
Windham, H. Fountaine, Archer,
Mainard, Twisden, Zise, Waller.

(*k*) Walp. Let. to Montag. lre 195.

(*l*) Fost. Cr. law, sect. 402. 2 St. Tri.
159.

try the cause. Incensed by the disappointment, and offended with the conduct, the Protector said to him in anger, "You are not fit to be a judge."--HALE, gravely answered, "it is true."

He continued, notwithstanding, to administer justice until the death of Cromwell, when he not only refused the mourning sent for him and his domestics, but also to accept the new commission, offered him by Richard; and though all the judges pressed it, and employed others to solicit him, yet he rejected every importunity, saying, "I can act no longer under such authority."

From this time, until the *parliament* assembled (*m*) which called home Charles II. he sedulously secluded himself from his profession and the world; but being now returned a member for the county of Gloucester, his privacy was in consequence disturbed;--contemplation changed into action, and the sweets of retirement gave way to the calls of his country.

Averse as he was, from those principles, which influenced the government of Cromwell, he nevertheless avoided the extremities, into which the adverse party were too often precipitated. Faction and party he equally despised. Though attached to monarchy and his sovereign, he was not for receiving Charles without reasonable restrictions; conceiving the restoration a fit opportunity to limit that prerogative, which had given rise to such recent and unparalleled calamities.

We are taught under every form of government to apprehend usurpation, either from the abuse or from the extension of the executive power; and though it be no advantage to a prince to enjoy more power than is consistent with the good of his subjects, yet this maxim is but a feeble security against the passions and follies of men. Those who are intrusted with power in any degree,

(*m*) May, 1660.—Or *Convention*, as it was not summoned by the king's writ. Burnet's Hist. oct. vol. i. p. 122. it came afterwards to be called, because

are disposed, from the mere dislike of constraint, to remove opposition (*n*). Sensible of such truths, HALE moved the commons, that "a committee might be appointed to look " into the propositions which had been made, and the con- " cessions which had been offered by the late king, that " from thence they might digest such propositions as they " should think fit, to be sent over to the king (*o*)." This motion, through the influence of general Monk, failed of success; it manifested, however, a warm regard for the public, a high respect for its laws, and that HALE was no friend to those opinions, which are too frequently urged in support of the indefeasible right of prerogative. The motives which determined the fate of this motion, were the reverse of, and equally in extreme with those, which influenced the commons against Charles the First. The general opinion, now seemed to condemn all jealous capitulations with the sovereign. Harassed with convulsions, men ardently wished for repose, and were terrified at the mention of negotiation or delay. Added to this, the passion for liberty, having produced such horrid commotions, began to give place to a spirit of loyalty and obedience (*p*). Why Monk should disapprove the imposition of rational conditions, is not easily to be accounted for; he seemed resolved, however, that the crown, which he intended to restore, should be conferred on the king, entirely free and unincumbered (*q*). He knew not, perhaps, that liberty is never in greater danger, than when we measure national felicity by the blessings which a prince may bestow, or by

(*n*) Ferguson on Civil Society.

(*o*) Burnet's Hist. oct. vol. i. p. 122.

(*p*) Hume.

(*q*) *Id.* Of general Monk, Mr. Millar believes, that his original intention was to seize upon the protector's place for himself; and that he only took up the idea of restoring the exile when he saw the sense of the nation was decidedly in favour of that measure. Mill. View of the Eng. Government. The conduct of Monk was certainly mysterious. In

the opinion of Mr. Fox, "personal " courage appears to have been Monk's " only virtue: reserve and dissimu- " tion made up the whole stock of his " wisdom." Fox's Hist. Ja. 2. p. 19. But in justification of Monk, see Dr. Price's Tract, on "the Mystery and " Method of the Restoration," pub- lished in 1680, and republished by Mr. Baron Maseres, in his Select Tracts re- lating to the Civil Wars, in the reign of Charles the First, part 2, pa. 295.

the mere tranquillity which may attend an equitable administration. The sovereign may dazzle with his heroic qualities; he may protect his subjects in the enjoyment of every animal advantage or pleasure: but the benefits arising from liberty are of a different sort; they are not the effects of a virtue and of a goodness, which operate in the breast of one man, but the communication of virtue itself to many; and such a distribution of functions in civil society, as gives to numbers the exercises and occupations which pertain to their nature (*r*).

The precipitate and unconditional restoration of Charles, entailed upon the nation all its former disorders, and almost ensured a second harvest of tumult and dissention. Charles II. immediately after his restoration, however, came to the house of peers, and in the most earnest terms, pressed an act of general indemnity; he urged not only the necessity of it, but the obligation of a promise which he had formerly given; a promise which he would ever regard as sacred, since to that he probably owed the satisfaction of meeting his people in parliament.—This measure of the king, though irregular (*s*), was received with great satisfaction; and the commons, after some debate, appointed a committee to forward the generous purpose (*t*).

Our author, then Serjeant HALE, had the honour of being nominated one of that committee (*u*): and in the execution of this high trust, exerted all the powers of his mind, and all the goodness of his heart, to terminate those evils which had too long and too successfully prevailed. Prudence and humanity dictated, that the sooner the bill passed, the sooner the blessings of peace would

(*r*) Dr. Ferguson.

(*s*) By taking notice of a bill which depended before the houses.

(*t*) Parl. Hist. vol. ii. p. 390.

(*u*) Sir John Dalrymple observes, that "Charles privately promoted the success of the bill of indemnity in

"the commons, and publicly checked "the severity of the house of lords in "their proceedings upon it." Mem. Gr. Br. p. 21. and Macph. Hist. vol. ii. p. 35. Hale's name appears on several Committees, Com. Jour. 4 vol. 2, 7, 8, 26, 27.

be diffused. With an assiduity to be equalled only by his philanthropy, he framed, carried on, and supported the bill.

Indisposed as his manners were to that versatility of conduct which recommends to notice and preferment, yet such was his reputation, that (to use the words of Mr. Emlyn) "it was thought an honour to his majesty's government, to advance him to the station of lord chief baron (x)." When the earl of Clarendon, notified to him the appointment, he was pleased to express himself in a peculiar manner:—"If the king" (said the chancellor) "could have found an honester or an abler man for the employment, he would not have advanced you to it; he prefers you, because he knows no one who so well deserves it."

Unambitious, diffident, and reserved, HALE studiously avoided the honour of knighthood, usually consequent on such a promotion; he declined every occasion of waiting on the king; but the chancellor one day introducing him as "the modest chief baron," his majesty immediately knighted him.

He presided eleven years in the court of exchequer, with such singular propriety, that he not only raised the reputation of the court, but merited and received the approbation of his profession, and the gratitude of the public.

Murmurs were indeed heard, invidiously and industriously insinuating that he did not decide with sufficient quickness. Admitting that some circumstances might apparently have justified the imputation, yet on the most scrupulous examination, it is evident, that it could not have arisen, either from ignorance or neglect. Solitude alone, induced him to deliberate in decision; which had

(x) Nov. 7, 1660. Vide 1 Sid. 4. Mr. Serjeant HALE, called by his Majesty to be Chief Baron of his highness' Court of Exchequer. Com. Journ. 8 vol. 187.
On the 20th Nov. 1660, a warrant was ordered for a new election for the County of Gloucester, in the place of

this good effect, that whatever he had once determined, was seldom, if ever, heard again.

Burnet remarks, that "nothing was more admirable in him than his patience: that he would bear with the meanest, and give every man his full scope, thinking it much better to lose time than patience. In summing up of an evidence to a jury, he would always require the bar to interrupt him, if he did mistake, and to put him in mind of it, if he did forget the least circumstance. Some judges (adds the bishop) have been disturbed at this, as a rudeness, which he always looked upon as a service and respect done to him." Justice, it has been said, should be speedily administered. Though the position cannot be questioned, yet is there a wise or a good man, who would not prefer the decision of one judge, whose opinion, though slow, is the effect of deliberation, to that of a thousand, who determine hastily, and of course hazardingly? Those who think despatch the great excellence of justice, will doubtless admire the quickness of a Turkish suit; and be inclined to prefer the determination of a Cadi, such as Shaw and Norden have described, to the administration of justice in their own country. The speediness, as well as severity, of justice in Turkey, is openly avowed on this principle, that it is better two innocent men should die, than one guilty live. We glory in adopting the reverse of this principle; greater caution therefore, in conformity to the principle, necessarily produces greater length in the enquiry (*y*).

HALE's administration of justice was not confined to the court in which he presided; he was one of the principal judges who sat in Clifford's inn, to adjust the disputes between the landlords and their tenants, after the dreadful conflagration; and was the first who offered to accommodate the differences respecting the rebuilding of the city.

(*y*) Eunomus, vol. iii. p. 203. Sir Virtue, fol. edit. p. 225.
William Temple's Essay on Heroic

In truth, the peaceable adjustment of that great undertaking was, in no small degree, owing to his care and judgment. Without detracting from the merit of the other judges, it must be acknowledged, that he was most instrumental in the completion of that beneficent design; inasmuch as he not only assisted at all the determinations, but contrived the rules by which they were accomplished (z).

The following precepts, (from the original under his own hand,) he rigidly observed, as

"THINGS NECESSARY TO BE CONTINUALLY HAD IN RE-
"MEMBRANCE."

"That in the administration of justice, I am entrusted
"for God, the king and country; therefore, that it must
"be done uprightly, deliberately, resolutely.

"That I rest not on my own understanding or strength;
"but implore and rest upon the direction and strength
"of God.

"That in the execution of judgment, I carefully lay
"aside my own passions, and not give way to them, how-
"ever provoked.

"That I be wholly intent upon the business I am
"about, remitting all other cares and thoughts as unsea-
"sonable and interruptions.

(z) See Burn. own Times, vol. iv. 8vo. 365. On the 18th September, 1666, the parliament met, and immediately passed an act for erecting a court of judicature, to settle all differences between landlords and tenants, respecting houses which had been destroyed by the fire; and appointed the justices of the king's bench and common pleas, and the barons of the exchequer, judges of the court; who conducted themselves with such strict justice, that the citizens, as a testimony of respect, caused their portraits to be hung up in Guildhall.—The portrait of Sir Matthew Hale was painted by Michael Wright.

Mr. Granger enumerates the following portraits of Sir Matthew Hale; viz.

Sir Matthew Hale, Lord Chief Justice of the King's Bench; M. Wright p. G. Vertue sc. 1735; h. sh.

Matthews Hale, miles &c. R. White sc. a roll in his right hand; large h. sh.—A copy by Van Hove.

Sir Matthew Hale; large h. sh.—Copied from White.

Matthews Hale, miles, &c. Van Hove sc. sitting in an elbow chair; h. sh.

Matthews Hale, &c. Van Hove sc. sitting; 8vo.

Matthews Hale, &c. Clarke sc. sitting; 8vo.

Lord Chief Justice Hale; small 4to. printed with the "Sum of Religion," in a large half-sheet. Grang. Biogr. Hist. vol. iii. 8vo. 365.

“ That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.

“ That I never engage myself in the beginning of any cause, but reserve myself unprejudiced ’till the whole be heard.

“ That in business capital, though my nature prompt me to pity; yet, to consider that there is also a pity due to the country.

“ That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

“ That I be not biassed with compassion to the poor, or favour to the rich, in point of justice.

“ That popular, or court applause, or distaste, have no influence in any thing I do, in point of distribution of justice.

“ Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

“ If in criminals it be a measuring cast, to incline to mercy and acquittal.

“ In criminals that consist merely in words, when no more harm ensues, moderation is no injustice.

“ In criminals of blood, if the fact be evident, severity is justice.

“ To abhor all private solicitations, of what kind soever, and by whomsoever, in matters depending.

“ To charge my servants not to interpose in any business whatsoever; not to take more than their known fees; not to give any undue precedence to causes; not to recommend counsel.

“ To be short and sparing, at meals, that I may be the fitter for business.”

With what spirit he conformed to the most essential of these rules, may be readily collected from the following instances.

A noble duke, having a suit depending, came to him with a view to explain the circumstances which had given rise to it, that he might the better understand it when in court; the chief baron, suddenly interrupting the narration, said, "You do not deal fairly to come about such affairs, for I never receive any information of causes but in open court, where both parties are to be heard alike;" and would not suffer him to proceed. His grace departed not a little dissatisfied, and formally made mention of it to the king; who silenced him by observing, "I verily believe he would have used me no better, had I gone to solicit him in any of my own causes (a)."

The following anecdote, which some have considered as an honour to his memory, has, by others, been censured, as a reflection on his understanding; imputing that to affectation, which evidently resulted from a strict observance of his duty. A gentleman having a cause to try before him, sent him a buck. He would not proceed in the trial, until the buck was paid for, which induced the plaintiff to withdraw his record.

At Salisbury, the dean and chapter, in conformity with an established custom, presented him with six sugar-loaves; he made his servants pay for them, before he would try a cause in which they were concerned. These instances, may to some, appear rather scrupulous, if not fastidious. But though we may withhold our approbation, there is surely nothing to reprove.

Melancholy is the truth, that the frequency of envy renders it so familiar, that it even escapes our notice; nor do we reflect upon its turpitude, until we have felt its influence. To spread suspicion requires neither labour,

(a) "I remember (says Dryden) a saying of king Charles II. on Sir Matthew HALE (who was doubtless an uncorrupt and upright man), that his servants were sure to be cast on a trial which was heard before him; not that he thought the judge was possible to be bribed, but that his integrity might be too scrupulous, and that the causes of the crown were always suspicious when the privileges of subjects were concerned."*

* Dedic. of Trans. from Juvenal.

courage, nor expense; it is easy for the author of a lie, however malignant, to escape detection, and infamy needs very little industry to assist its circulation. Whether HALE had excited malice by his eminence, I cannot determine; experience, no doubt, convinced him, that the mention of a name which distinction had rendered eminent, only provoked the asperity of the envious and the animosity of the malignant. That his children therefore might not indulge their credulity, at the expense of another's reputation, he with great wisdom, cautions them against it in the following letter; a letter, which may with truth be deemed a valuable literary relic, and a strong proof of the attention which he paid to the morals and the manners of his children.

January 19, 1660.

CHILDREN,

I thank God I came well to Farrington this Saturday about five of the clock, and because I have some leisure time at my inn, I could not spend that time more to my own contentment, and your benefit, than by my letter to give you all good counsel; the subject whereof at this time shall be concerning *speech*; because much of the good or evil that befalls persons, doth occasionally happen by the well or ill managing of that part of humane conversation. I shall, as I have leisure and opportunity at other times, give you my directions concerning other subjects. First, as concerning the former, observe these directions:

Observe and mark as well as you may; what is the temper and disposition of those persons, whose speeches you hear; whether they be grave, serious, sober, wise, discreet persons: if they be such, their speeches commonly are like themselves, and well deserve your attention and observation. But if they be light, impertinent, vain, passionate persons, their speech is for the most part accord-

ing, and the best advantage that you will gain by their speech, is but thereby to learn their dispositions; to discern their failings, and to make yourselves the more cautious both in your conversation with them, and in your own speech and deportment; for in the unseemliness of their speech you may better discern and avoid the like in yourselves.

If any person, that you do not very well know to be a person of truth, sobriety, and weight, relate strange stories, be not too ready or easy to believe them, nor report them after him; and yet, unless he be one of your familiar acquaintance, be not too forward to contradict him; or if the necessity of the occasion require you to declare your opinion of what is so reported, let it be modestly and gently, not too bluntly or coarsely; by this means, on the one side you shall avoid being abused by your too much credulity; on the other side, you shall avoid quarrels and distaste.

If any man speak any thing to disadvantage or reproach of one that is absent, be not too ready to believe it, only observe and remember it; for it may be it is not true, or it is not all true, or some other circumstances were mingled with it, which might give the business reported a justification, or at least an allay; an extenuation or a reasonable excuse. In most actions, if that which is bad alone, or seems to be so, be reported, omitting that which is good, or the circumstances that accompany it, any action may be easily misrepresented; be not too hasty therefore to believe a reproach; till you know the truth, and the whole truth.

If any person report unto you some injury done to you by another, either in words or deeds, do not be over-hasty in believing it; nor suddenly angry with the person so accused; for it is possible it may be false or mistaken; and how unseemly a thing will it be, when your credulity and passion shall perchance carry you, upon a supposed

injury, to do wrong to him that hath done you none; or at least, when the bottom and truth of the accusation is known, you will be ashamed of your passion. Believe not a report till the accused be heard; and if the report be true, yet be not transported either with passion, hasty anger, or revenge, for that will be your own torment and perturbation. Even when a person is accused or reported to have injured you, before you give yourself leave to be angry, think with yourself, Why should I be angry before I am certain it is true? or, if it be true, How can I tell how much I should be angry, till I know the whole matter? Though it may be he hath done me wrong, yet possibly it is misrepresented, or it was done by mistake, or it may be he is sorry for it: I will not be angry till I know there be cause, and if there be cause, yet I will not be angry till I know the whole cause; for till then, if I must be angry at all, yet I know not how much to be angry; it may be it is not worth my anger, or if it be, it may be it deserves but a little. Thiss will keep your mind and carriage upon such occasions in a due temper and order; and will disappoint malicious or officious tale-bearers.

If a man whose integrity you do not very well know, makes you great and extraordinary professions and promises, give him as kind thanks as may be, but give not much credit to it: cast about with yourself what may be the reason of thiss wonderful kindness; it is twenty to one but you will find something that he aims at, besides kindness to you; it may be he hath something to beg or buy of you, or to sell you, or some such bargain that speaks out at last his own advantage, and not yours; and if he serve his turn upon you, or if he be diasappointed, his kindness will grow cool.

If a man flatter and commend you to your face, or to one that he thinks will tell you of it, it is a thousand to one either he hath deceived and abused you some way, or means to do so. Remember the fable of the fox, com.

mending the singing of the crow, when she had somewhat in her mouth that the fox liked.

If a person be cholerick, passionate, and give you ill language, remember, rather to pity him than to be mov'd into anger and passion with him, for most certainly that man is in a distemper and disorder; observe him calmly, and you shall see in him so much perturbation and disturbance, that you will easily believe he is not a pattern to be imitated by you, and therefore return not choler for anger; for you do but put yourself into a kind of frenzy because you see him so. Be sure you return not railing, reproaching, or revileing, for revileing; for it doth but kindle more heat, and you will find silence, or at least very gentle words, the most exquisite revenge of reproaches that can be; for either it will cure the distemper in the other, and make him see and be sorry for his passion, or it will torment him with more perturbation and disturbance. But howsoever, it keeps your innocence, gives you a deserved reputation of wisdom and moderation, and keeps up the serenity and composure of your mind; whereas passion and anger do make a man unfit for any thing that becomes him as a man, or as a Christian.

Some men are excellent in knowledge of husbandry, some of planting, some of gardening, some in the mathe-maticks, some in one kind, some in another; in all your conversation, learn, as near as you can, wherein the skill and excellence of any person lies, and put him upon talk of that subject, and observe it, and keep it in memory or writing; by this means you will glean up the worth and excellence of every person you meet with, and at an easie rate put together that which may be for your use upon all occasions.

Converse not with a lyar or a swearer, or a man of obscene or wanton language; for either he will corrupt you, or at least it will hazard your reputation, to be one of the like making; and if it doth neither, yet it will fil

your memory with such discourses, that will be troublesome to you in after time, and the returns of the remembrance of the passages which you long since heard of this nature, will haunt you, when your thoughts should be better employed.

Now as concerning your own speech, and how you are to manage it, something may be collected out of what goes before; but I shall add some things else.

Let your speech be true; never speak any thing for a truth, which you know or believe to be faulse. It is a great sin against God, that gave you a tounge to speak your offence against humanity itself, for where there is no truth, there can be no safe society between man and man. And it is an injury to the speaker; for, besides the base disreputation it casts upon him, it doth in time bring a man to that baseness of mind, that he can scarce tell how to tell truth or to avoid lying, even when he hath no colour of necessity for it; and it comes to such a pass, that as another man cannot believe he tells a truth, so he himself scarce knows when he tells a lye: and observe it, a lye ever returns with discovery and shame at the last.

As you must be careful not to lye, so you must avoid coming near it; you must not equivocate; you must not speak that absolutely, which you have but by hearsay or relation; you must not speak that as upon knowledge, which you have but by conjecture or opinion only.

Let your words be few, especially when your betters, or strangers, or men of experience, or understanding, are in place; for you do yourself at once two great mischiefs: *first*, you betray and discover your own weakness and folly; *secondly*, you rob yourself of that opportunity, which you might otherwise have, to gain knowledge, wisdom, and experience, by hearing those that you silence by your impertinent talking.

Be not over-earnest, loud, or violent in talking, for it is unseemly; and earnest and loud talking make you over-

shoot and loose your business : when you should be considering and pondering your thoughts, and how to express them significantly, and to the purpose, you are striving to keep your tounge going, and to silence an opponent, not with reason but with noise.

Be careful not to interrupt another in his talk ; hear him out ; you will understand him the better, and be able to give him the better answer ; it may be, if you will give him leave, he will say somewhat more than you have yet heard, or well understood, or that which you did not expect.

Allways before you speak, especially where the business is of moment, consider beforehand ; weigh the sence of your mind, which you intend to utter ; think upon the expressions you intend to use, that they be significant, pertinent, and unoffensive ; and whereas it is the ordinary course of inconsiderate persons to speak their words, and then to think, or not to think till they speak ; think first and speak after, if it be in any matter of moment or seriousness.

Be willing to speak well of the absent, if you do not know they deserve ill : by thiss means, you shall make yourself many friends ; and sometimes an undeserved commendation is not lost to the party to whom it is given. I have known some men that have met with an undeserved commendation, out of shame of being worse than they have been reported, secretly to take up practises answerable to their commendation, and so make themselves as good as they were reported.

Be sure you give not an ill report, to any that you are not sure deserves it. And in most cases, though a man deserves ill, yet you should be sparing to report him so ; in some cases indeed you are bound, in honesty and justice, to give that account concerning the demerit or default of a person, that he deserves : as namely, when you are called to give testimony for the ending of a contro-

versie; or when the concealing of it, may harden and encourage a person in an evil way, or bring another into danger; in such cases, the very duty of charity binds you to speak your knowledge, nay your probable fear or suspicion of such a person; so it be done for prevention of greater inconveniencies and in love; and especially if the discovery be made to a person that hath the superintendence, care, or authority over the person complained of: for this is an act of love and duty. But for any person maliciously, busily, and with intent to scandalise another, to be whispering tales and stories to the prejudice of others, this is a fault: if you know any good of any person, speak it as you have opportunity: if you know any evil speak it, if it be really and prudently done for the good of him, and the safety of others; otherwise rather chuse to say nothing, than to say any thing reproachfully, maliciously, or officiously, to his prejudice.

Avoid swearing in your ordinary communication, unless called to it by the magistrate; and not onely the grosser oaths, but the lesse: and not onely oaths, but imprecations, earnest and deep protestations; as you have the commendable example of good men to justify a solemn oath before a magistrate, so you have the precept of Our Saviour, forbidding it otherwise.

Avoid scoffing, and bitter and biting jeering and jesting; especially at the condition, credit, deformity, or natural defects of any person; for these leave a deep impression, and are a most apparent injustice; for were you so used, you would take it inwardly and amiss; and many times such an injury costs a man dear, when he little thinks of it.

Be very careful that you give no reproachful, bitter, menacing, or spiteful words to any person, nay not to servants or other persons of an inferiour condition; and that upon these considerations: 1. There is not the meanest person but you may stand in need of him in one kind,

or at some time or another : good words, make friends, bad words, make enemies ; it is the best prudence in the world to make as many friends as honestly you can, especially when it may be done at so easie rate as a good word ; and it is the greatest folly that can be, to make an enemy by ill words, which do not at all any good to the party that useth them. 2. Ill words, provoke ill words again, and commonly such ill words, as are gained by such a provocation, especially of an inferiour, stick closer, and wound deeper, than such as come unprovoked by ill language, or from an equal. 3. Where faults are committed, they may, and by a superiour must, be reprov'd ; but let it be done without reproaches, or bitterness ; otherwise it loseth its due end and use, and instead of reforming the offence, exasperates the offender, and makes him worse, and gives him the cudgel to strike againe ; because it discovers your own weakness when you are reprehending another, and lays you justly open to his reproof, and makes your own but scorned and disesteemed. I press this the rather, because most ordinarily ill language is the folly of children, and of weak and passionate people.

If there be occasion for you to speak in any company, always be careful, if you speak at all, to speak latest, especially if strangers are in company ; for by this means you will have the advantage of knowing the sence, judgment, temper, and relations of others, which may be a great light and help to you in ordering your speech, and you will better know the inclination of the company, and speak with more advantage and acceptation, and with more security against giving offence.

Be careful that you commend not yourselves ; it is the most unuseful and ungrateful thing that can be. You should avoid flattery from others, but especially decline flattering of yourselves ; it is a sign your reputation is small and sinking, if your own praises must be your flat-

terers or commendrs, and it is a fulsome and displeasing thing for others to hear it.

Abhor all foul, unclean and obscene speeches; it is a sign that the heart is corrupt; and such kind of speeches will make it worse; it will taint and corrupt yourselves and those that hear it, and brings disreputation to those that use it.

Never use any profane speeches, nor make jests of scripture-expressions; when you use the names of God or Christ, or any passages or words of the holy scripture, use them with reverence and seriousness, and not lightly or scurrilously; for it is a taking of the name of God in vain.

If you hear of any unseemly expressions used in religious exercises, you must be careful to forget and not to publish them; or if you at all mention them, let it be with pity and sorrow, not with derision or reproach.

Do not upbraid any, or deride any man for a pious, strict, or religious conversation; for if he be sincere, you dishonour God and injure him; if he be an hypocrite, yet it is more than you know; or if you know him to be such, yet his external piety and strictness is not his fault, but his dissimulation and hypocrisy; and though his hypocrisy be to be detested, external piety and religion is to be commended, not derided.

Have as little conversation as is possible with hereticks, or persons obstinately perverted on matters of religion; as Papists, Quakers, Anabaptists, Antinomians, Enthusiasts, and the like: but especially converse not with them on matters of religion: for instead of converting them by your perswasions to the truth, you shall but harden them the more, and endanger yourself. They are to be dealt with in all these matters onely by persons of great abilities; for a perverted, corrupted mind, or obstinate spirit, carries in it a contagion, as infectious and much more

dangerous than the plague in the body, where their opinions meet with a young opponent.

And thus, children, as the time and my remembrance would give me leave, I have set down some observations concerning this subject, for your direction and practice : what is wanting you may abundantly supply, by reading the wise counsel of Solomon, in his book of Proverbs. Read these my directions often; think of them seriously; and practice them diligently. Though they seem but dry and ordinary things, yet you will find them useful in your conversation, which will be every day more evident unto you, as your judgment, understanding and experience increase.

I have but little more to write at this time, but to wish and command you to remember my former counsels, that I have often given you. Begin and end the day with private prayers to God, upon your knees; read the scriptures often and seriously; be attentive to the publick worship of God in the church; keep yourselves still in some good employment, for idleness is the devil's opportunity, and the nursery of vain and sinful thoughts, which corrupt the mind, and disorder the life.

Let the girls take care of such business of my family as is proper for them; and their recreation may be walking abroad in the fields, in fair or frosty mornings; some work with their needles; reading of history or herbals; setting of flowers or herbs; practising of their musick, and such innocent and harmless exercises. Let the boys be diligent at their books, and when they have performed their tasks, I do not deny them such recreations as may be healthy, safe, and harmless.

Be you all kind and loveing one to another; honouring your minister; not bitter nor harsh to my servants. Be respectful to all. Bear my absence patiently, cherefully and faithfully. Do all things as if I were present among you and beheld you, for you have a greater Father than I

am, that always and in all places beholds you, and knows your hearts and thoughts : study to requite the love and care and expence of your father for you, with dutifulness, observance and obedience to him ; and account it an honour, that God hath given you an opportunity in my absence, by your care, faithfulness and industry, to pay some part of that debt, that by the laws of nature and gratitude you owe unto me. Be frugal in my family ; but let there be no want. Provide conveniently for the poor that come to my door. And I pray God to fill all your hearts with his grace, fear and love ; and to let you see the advantage and comfort of serving him ; and his blessing, and presence, and comfort, and direction, and providence, be with you and over you all ! I am

Your ever loving father,

MATTHEW HALE.

On the 18th of May 1671, Hale was promoted to the dignity of lord chief justice of England.--Within five years from this promotion, he was attacked by the disorder of which he died. From the first moment of his illness, he visibly and hastily declined ; and though so debilitated that he could scarce, even when supported, walk, much less endure the fatigue of his profession, yet with painful industry, he pertinaciously discharged the different functions of his high office.

This attention to his public duty, having increased the disorder with which he was afflicted, he at length resolved, to retire from the labours of the profession ; (a profession which few have strength enough to bear, and which none can bear long), and therefore solicited the king to accept his resignation. His majesty, unwilling to comply with the request, was desirous that he should continue chief justice, on condition only that he would transact in his chamber, as much of the public business, as he possibly could. This he declined ; adding "I cannot with a good

"conscience continue in office, since I am no longer able to discharge the duty belonging to it." His majesty, not well knowing how to deny the request, delayed however to comply with it; and the chancellor, though often pressed, would not solicit the king to accept his resignation. Thus situated, the chief justice, on the 21st of February 1675-6, went before a master in chancery, with an instrument drawn and engrossed by himself, which he there formally sealed and delivered, requiring it might be enrolled. He afterwards produced the original to the chancellor, resigning his office in this form:—"Omnibus Christi fidelibus ad quos præsens scriptura pervenerit, Matthæus Hale, miles, capitalis justiciarius domini regis ad placita coram ipso rege tenenda assignatus, salutem in Domino sempiternam: Noveritis me præfatum Matthæum Hale militem, jam senem factum, et variis corporis mei senilis morbis et infirmitatibus dirè laborantem et adhuc detentum, hâc chartâ meâ resignare, et sursum reddere serenissimo domino nostro Carolo secundo, Dei gratiâ Angliæ, Scotiæ, Franciæ, et Hiberniæ, regi, fidei defensori, &c. prædictum officium capitalis justiciarii ad placita coram ipso rege tenenda, humillimè petens quòd hoc scriptum irrotaletur de recordo. In cujus rei testimonium huic chartæ meæ resignationis, sigillum meum opposui, dat' vicesimo primo die Februarii, anno regni dict' dom. regis nunc vicesimo octavo."

This he did to testify, (as himself asserted,) not only his concurrence in the removal, but to obviate an objection, that a chief justice, being appointed by writ, was not removeable at pleasure, as judges by patent were (b).

To those who are unacquainted with our history, it may seem strange, that the judges were formerly altogether dependent on the crown, appointed at its pleasure, re-

(b) 2. Inst. 26. 4. Inst. 75. Cro. tice of the king's bench, resigned his
Car. 1.—The Earl of Mansfield, after office in a similar manner. See *Ann.*
having been thirty-two years chief jus- *Reg.* for 1788, p. 241.

movable at its will. Prerogative, no doubt, found it necessary, but the subject found it partial and oppressive. Before the close of the seventeenth century, and anterior to the Revolution, men of servile dispositions were raised to the bench, while those who justly administered the law, were removed. Even-handed justice gave way to wicked policy;—objects the most precious were by vicious constructions, without ceremony and without fear, sacrificed by those, whose duty it was to protect and to preserve them. Sad and melancholy must have been the prospect! When the channels of public justice are corrupted, when justice itself is converted into the means of revenge, political misery is arrived at its height. From the numerous instances which might be educed in support of the assertion, the following one is sufficient to establish it beyond doubt or contradiction. In the year 1683, on the trial of Lord Russell, Jeffreys, in his speech to the jury, turned the untimely fate of Essex, into a proof of the conspiracy in which he and Russell had been engaged. Pemberton, who presided as chief justice, behaved to the prisoner, with a candour and decorum, seldom found in the judges of that reign, or the succeeding one. But before Sidney was brought to his trial, Pemberton was removed from the head of the King's Bench, and even from the privy council, and Jeffreys put in his place(c); in order by the

(c) See Cro. Car. 203, chief baron Walter's case. Jeffreys did not immediately succeed Sir Francis Pemberton, whose immediate successor was Sir Edmund Saunders, a man of too extraordinary a complexion to be passed over in silence. He was originally a strolling beggar about the streets, without either known parents or relations. He came often to beg scraps at Clement's Inn, where he was taken notice of for his uncommon sprightliness; and as he expressed a strong inclination to learn to write, one of the attornies' clerks taught him, and soon qualified him for an hackney-writer. He took all opportunities of improving himself,

by reading such books as he borrowed of his friends; and in the course of a few years became an able attorney, and a very eminent counsel. His practice in the court of King's Bench was exceeded by none; his art and cunning were equal to his knowledge; and he carried many a cause by laying snares. If he was detected, he was never out of countenance, but evaded the matter with a jest, which he had always at hand. He was much employed by the king against the city of London, in the business of the *quo warranto*. His person was as heavy and ungain, as his wit was alert and sprightly. He is said to have been "a more lump of

fierceness of his manner, to cope with a man, the vigour of whose spirit was known throughout Europe (*d*).

In the year 1691, a bill passed both houses to make the salaries and offices of the judges for life; but the king, even at that great æra of liberty, refused his assent, "leaving room for a succeeding monarch to give unasked to the wishes of his people, what William refused to their prayers." However, to maintain the dignity and independence of the judges, it was soon after enacted, that their commissions should be made (not, as formerly, *durante bene placito*, but) *QUAMDIU BENE SE GESSERINT*;—their salaries were also ascertained and established, and their removal declared lawful on the address of both houses of parliament, 13 Will. 3. c. 2. (*e*). This law has been since improved. His present majesty in the beginning of his reign (*f*) declared from the throne, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown;" and therefore earnestly recommended to parliament, that the judges might be continued in their offices *DURING THEIR GOOD BEHAVIOUR, NOTWITHSTANDING ANY DEMISE OF THE CROWN*. This the parliament immediately took into consideration, and, with all possible dispatch, passed a law in every respect conformable with the recommendation (*g*).

Charles, wearied by applications, at length, with unfeigned reluctance, accepted his resignation; at the same time assuring him, that "he should still look on him as

"morbid flesh;" the smell of him was so offensive, that people usually held their noses when he came into court. One of his jests on this occasion was, that "none could say he wanted issue, for he had no less than nine in his back." Jeffreys succeeded him September 29th, 1683. *Grang. Bing. Hist.* Vol. III. oct. p. 367.

(*d*) Dalrym. Mem. Gr. Br. p. 91. 95.

(*e*) Charles the first, at the request of his parliament, instead of the patents during pleasure, gave all the judges patents during their good behaviour. May, p. 107.

(*f*) March 3, 1701. See *Ann. Reg.* for 1701, p. 243.

(*g*) 1 Geo. 3. c. 23. See *Edin. Rev.* for July 1809.

“ his oracle, and have recourse to his advice when his health would permit, and that he should continue his salary during life.” This instance of beneficence, exceeding Sir Matthew’s opinion of his own deserts, he wrote to the lord treasurer, requesting that his salary might be continued only during pleasure ; but the king insisting on bestowing it for life, it was of course so granted.

Sir Richard Rainsford, who was but a secondary character in his profession, had the disadvantage of succeeding Sir Matthew, who was confessedly at the head of it. The merit of Rainsford, eclipsed by the superior lustre of his predecessor, appeared to be much less than in reality it was.—Let it not however be forgotten, that he as much excelled Sir William Scroggs, who succeeded him, in point of integrity, as he was below Sir Matthew HALE in point of learning. When the commission was delivered to Rainsford, the chancellor reminded him—that the very labours of the place, the weight and fatigue which attended it, were no small discouragements ; “ for,” continued the chancellor, “ what shoulders may not justly fear the burthen, which made him stoop who went before you ? Yet I confess, you have a greater discouragement than the mere burthen of the place, in the inimitable example of your predecessor : a chief of indefatigable industry, invincible patience, exemplary integrity and magnanimity, and so absolute a master in the science of law.”

To this encomium chief justice Rainsford answered, “ I have been witness to the greatness of his learning, which charmed his auditors to reverence and attention. He is a person of whom I may boldly say, that as former ages cannot show any superior, so I am confident succeeding times will never show an equal. These considerations, heightened by what I have heard from your lordship, make me anxious how I shall succeed so good, so great a man ; one who will be eminently famous to all posterity.”

The hope that relaxation would insure repose, was flattering and delusive. His disorder, rather increased than diminished, from the time of his resignation; inso-much that within a short time afterwards, all hopes of his recovery were abandoned. He supported himself however with equanimity and patience. In the excruciating moments of pain he forbore complaint, and when at his devotions was fervent and composed. In this melancholy state, he was informed that the sacrament was to be administered at his parish church; but that as he could not possibly attend, it should be administered to him in his own house. "No, (exclaimed Sir Matthew,) my heavenly Father has prepared a feast for me, and I will go to my Father's house to partake of it!" He was carried to the church, where, with the other communicants, he received the sacrament.

His whole powers were now engrossed by the contemplation of another state, and all conversation was now tedious, which had not some tendency to disengage him from human avocations, and expand his prospects into futurity. That he had some unaccountable presage of his death, is, (if credit be given to episcopal authority,) unquestionably true. But an assertion of this kind, in an age, liberal and enlightened like the present, may appear problematical.—Burnet has been bold enough to publish it;—few perhaps will give credit to the bishop; and though every one may be allowed to be sceptical on the subject, yet nothing could justify the suppression of so singular an anecdote.

"He had (says Burnet) some secret unaccountable presages of his death; for he said, that if he did not die on such a day, (which fell to be the 25th of November), he believed he should live a month longer; and he died that very day month."

Henry the Great had a similar prescience, which the Duke of Sully, who cannot be thought either a credulous

or a weak man, has noticed in a particular manner (*h*). Other instances, equally cogent, might no doubt be selected; but in such points, it is better to rest in the prudent state of neutrality, without engaging assent to either the one side or the other. Such an hovering faith as this, which refuses to settle upon any determination, is absolutely necessary in a mind that is careful to avoid errors and prepossessions. When the arguments press equally on both sides, in matters which are indifferent, the safest method is to give up ourselves to neither (*i*).

Consonant with the prediction, if such a prediction ever was declared, all that was mortal of Sir Matthew HALE, expired on the 25th of December, 1676.

His remains were deposited in the common cemetery of Alderly, among those of his ancestors. This was done in conformity with his own sentiments. He did not approve of the mode of burying in churches; because, as he was often heard to declare, "churches are for the living, "and church-yards for the dead." On his monument is this inscription:--

HIC INHUMATUR CORPUS
MATTHEI HALE, MILITIS,
ROBERTÆ HALE, ET JOANNÆ
UXORIS EJUS, FILII UNICI;
NATI IN HAC PAROCHIA DE ALDERLY,
PRIMO DIE NOVEMBRIS;
A. D. 1609.
DENATI VERO IBIDEM
VICESIMO QUINTO DIE DECEMBRIS,
A. D. 1676.
ÆTATIS SUÆ LXVII. (*k*)

(*h*) Mem. de Sul. tom. iii. 4to. 226.

(*i*) Spectator, No. cxvii.

(*k*) Though there be the utmost simplicity in the words of this inscrip-

tion, yet there appears a certain air of dignity in them, owing to the feet that compose them, which are all of the most generous quality. MASON.

Virtues which once were envied, because they eclipsed those of others, can no longer obstruct reputation; no one can now have any interest in the suppression of his praise.

HALE was of a middle stature, strong and well-proportioned; his countenance engaging; his conversation affable and entertaining, his elocution easy and persuasive; his temper warm, open, generous; affectionate to his family; sincere to his friends. However engaged in the service of his country, he neglected not the minds and manners of his children. To form their manners and direct their talents; to promote in them the practice of virtue and of piety—to shield them from imprudence, indigence, and misfortune, were the important objects of his instruction (*f*).

He seemed, from his youth, to have acquainted himself with wisdom and with knowledge; his virtue was not inferior to his learning; and as humility always accompanied the former, modesty was ever attendant on the latter. Notwithstanding the variety of his avocations, he daily pressed nearer to perfection, by a devotion, which though elevated was rational, and though regular was warm.

In his profession, his judgment was clear, his opinion was authority; and though he conscientiously discharged the duties which were attached to it, he disregarded the profits which resulted from it. When at the bar, nothing could induce him to prostitute his abilities; and though while there, civil war raged with all the violence of contention, yet he not only preserved his integrity, but lived in ease and security. Actuated by the example of Pomponius Atticus, he walked through times of the most turbulent distraction, uncensured, unhurt.—On the bench he reigned “a pure intelligence.” There he was all patience; and though the temper of the times too often made innovations in the profession, yet he never gave way to injustice, however formidable. Nothing could alarm, nor

(*f*) See the letter to his children, ante xxiv.

any thing allure him. Looking forwards to the lasting, incorruptible judgment of posterity, without fear, and above temptation, he became a shield to his fellow-citizens, a support to his profession, and the state. He held equity to be, not only part of the common law, but also one of its principal grounds; for which reason he reduced it to principles, that it might be studied as a science (*m*).

His abilities were so extensive, that it is almost incredible that one man, in no great space of time, should acquire such variety of knowledge; but when we reflect that his parts were lively, and his apprehension quick; that his memory was retentive, his judgment sound, and his application indefatigable; the mystery is unravelled, and admiration increases, as incredulity passes away.

With such virtues and such abilities, had he been insensible to the applause which was justly and liberally bestowed upon him, it might have been adduced, either as an instance of weakness or affectation; on the contrary, he had a becoming sense of the esteem in which he was held, attended with that self-approbation, which ever accompanies the accomplishment of worthy actions. For this however, he is represented as a vain person by Mr. Roger North (*n*), who by endeavouring to depreciate an exalted, established character, has only degraded his own.

Though religion be the most animating persuasion which the mind of man can embrace—though it gives strength to our hopes and stability to our resolutions—though it subdues the insolence of prosperity, and draws out the sting of affliction; yet such was the profligacy of the reign of Charles the second—so far removed from sound policy and good manners, that, at this period of ease and politeness, religion was not only grossly neglected,

(*m*) See his Analysis.

(*n*) In the reign of Charles II. North was a barrister of distinguished abilities, and in the succeeding reign was made Attorney General. He was a near relation of the Lord Keeper Guildford,

with whom he chiefly spent the active part of his life. He was author of the lives of Francis Lord Guildford, Lord Keeper; of Sir Dudley North; and of Dr. John North, Master of Trinity College, Cambridge.

but was daily exhibited as an object for the exercise of ridicule. To lessen the veneration that is due to religion, is a kind of zeal which no epithet is sufficient to stigmatize;—it is attacking the strongest hold of society, and attempting to destroy the firmest guard of human security. So alarming was this advance of impiety to HALE, that he often deplored it with unaffected sorrow.—Were it necessary to evince his abhorrence of it, I might content myself with appealing to the bright example of his life; but, however sufficient that might be for the purpose, it would yet be doing great injustice to his memory not to mention, that he employed some time in elegant instructive disquisition, on the most interesting topics of the christian religion. A religion, which he most sincerely held to be part of the common law of the country. Minutely observant of the rituals of devotion, he was, perhaps, singular in his deportment; but he for a long time concealed the consecration of himself to the stricter duties of religion, lest by some adventitious action he should bring piety into disgrace. In truth, he taught the theory of christianity by his precepts, and the practice by his example. The faith which influenced his own actions, he religiously communicated to others. He improved devotion where he found it, and kindled it where he found it not. May those who study his writings, imitate his life; and those who endeavour after his knowledge, aspire likewise to his piety! (o)

(o) That he was a friend to *religious* as well as *civil* liberty, cannot be doubted. "Bridgman and Wilkins" (says Burnet,) "set on foot a treaty, for a comprehension of such of the dissenters as could be brought into the communion of the church, and a toleration of the rest. HALE, then chief Baron, concurred with them in the design." 1 vol. Burn. Hist. of his own Times, oct. 363. The fact was that in Jan. 1667-8, Lord Keeper, Sir Orlando Bridgman, proposed a plan for the comprehension of the more moderate dissenters, and a limited indulgence towards such as could not be brought within the comprehension. The Bill, as drawn by Lord Chief Baron HALE, was presented to Parliament; but a resolution passed against admitting any Bill of that nature. Burnet's Life of Hale, p. 33. Reliquiæ Baxterianæ, vol. iii. p. 23. Birch's Life of Tillotson, p. 42.

By being ingenuous, he not only secured his independency, but raised himself above flattery or reproach, above menace or misfortune. Thus the rectitude of his conduct, added to the greatness of his abilities and the ease of his deportment, not only gained him universal respect, but rendered him more conspicuous than any of his contemporaries.

POSTSCRIPT.

It is laudable to respect such as are nobly descended, not merely from gratitude to those who have benefited society, but that others may be animated by their example. Laudable as such an attention most unquestionably is, yet as it is an honour from courtesy, and not of right, it must be received and cannot be demanded. Burnet, speaking of Sir Matthew HALE, says, "in after time it is not to be doubted but it will be reckoned no small honour to derive from him;" which induced me to subjoin the succeeding narrative.

HALE was twice married. His first wife was Ann, daughter of Sir Henry Moore, of Fawley, in Berkshire, grand-child to Sir Francis Moore, serjeant at law. By her he had ten children (*p*).

His eldest son (Robert) married Frances, daughter of Sir Francis Chock, of Avington, in Berkshire; by whom he had five children; Matthew, Gabriel, Ann, Mary, and Frances.

His second son (Matthew) married Ann, daughter of Mr. Matthew Simmonds, of Hilsley, in Gloucestershire; by whom he had one son, named Matthew.

His third son (Thomas) married Rebekah, daughter of Mr. Christian le Brune, a Dutch merchant; but died without issue.

His fourth son (Edward) married Mary, daughter of Edmond Goodyere, Esq. of Heythorp, in Oxfordshire; by whom he had two sons and three daughters.

His eldest daughter (Mary) married Edward Alderly, Esq. of Innishannon, in the county of Cork in Ireland, who dying, left her with two sons and three daughters. She afterwards married Edward Stevens, Esq. of Cherrington, in Gloucestershire.

(*p*) Four of them died young.

His youngest daughter (Elizabeth) married Edward Webb, Esq. barrister at law; she died, leaving two children.

His second wife was Ann, the daughter of Mr. Joseph Bishop of Fawley, in Berkshire, by whom he had not any issue.

It may not be improper also to mention, that Sir Matthew gave to the society of Lincoln's Inn the most valuable of his manuscripts. As they are principally professional, and perhaps unknown to many, no apology is necessary for enumerating them, or transcribing that part of the will which relates to the bequest.

"Item, as a testimony of my honour and respect to
"the society of Lincoln's-Inn, where I had the greatest
"part of my education, I give and bequeath to that ho-
"nourable society, the several manuscript books contained
"in a schedule annexed to my will: they are a treasure
"worth having and keeping, which I have been near
"forty years in gathering, with very great industry and
"expense. My desire is, that they be kept safe and alto-
"gether, in remembrance of me; they were fit to be bound
"in leather and chained, and kept in archives: I desire
"they may not be lent out or disposed of: only if I hap-
"pen hereafter to have any of my posterity of that soci-
"ety, that desires to transcribe any book, and give very
"good caution to restore it again in a prefixed time, such
"as the benchers of that society in council shall approve
"of; then, and not otherwise, only one book at one time
"may be lent out to them by the society; so that there
"be no more but one book of those books abroad out of
"the library at one time. They are a treasure that are
"not fit for every man's view; nor is every man capable
"of making use of them: only I would have nothing of
"these books printed, but entirely preserved together for
"the use of the industrious learned members of that
"society."

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Hornii astronomica.
Historia ecclesia Dunelmensis.
Holandi chymica.
De alchymiae scriptoribus.
The black book of the new law, collected by me, and
digested into alphabetical titles, written with my own
hand, which is the original copy.

(Signed)

MATTHEW HALE.

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1

THE
HISTORY
OF
THE COMMON LAW
OF
ENGLAND.

CHAP. I.

Concerning the distribution of the laws of ENGLAND into Common law and Statute law. And first, concerning the Statute law, or Acts of Parliament.

THE laws of England, may aptly enough be divided into two kinds, viz. *lex scripta*, the written law; and, *lex non scripta*, the unwritten law (a). For although, as shall be shewn hereafter, all the laws of this kingdom have some monuments or memorials thereof in writing, yet all of them have not their original in writing: for some of those laws have obtained their force by

(a) Constat autem jus nostrum, quo utimur, aut scripto, aut sine scripto; ut apud Græcos *Τὰν δὲ μὲν ῥητορικῶν, δὲ δὲ ῥητορικῶν*. Inst. l. 1. t. 2. s. 3. Et non ineleganter in duas species jus civile distributum esse videtur; nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedæmoniorum, fluxisse videtur. In his enim civitatibus ita agi solitum erat, ut Lacedæmonii quidem ea, quæ pro legibus observabant, memoriæ mandarent: Athenienses vero ea, quæ in legibus scripta comprehendissent, custodirent. Id. s. 10. Indeed under those two comprehensive heads, all laws have

been classed by ancient writers. See Aristotle's distinction of laws, 1 Rhet. c. 3. and the Antigone of Sophocles, v. 459. But see Dr. Taylor's Elements of the Civil Law, 247. seq. and Dr. Adams' Roman Antiquities;—a book which not only facilitates the acquisition of classical learning, but accelerates the communication of useful knowledge. Sir John Fortescue, (who was chancellor to Henry the sixth), remarks, quod omnia jura humana aut sunt lex naturæ, consuetudines, vel statuta, quæ et constitutiones appellantur. De laud. leg. Angl. c. 15.

immemorial usage or custom; and such laws are properly called *leges non scriptæ*, or unwritten laws or customs.

Those laws, therefore, that I call *leges scriptæ*, or written laws, are such as are usually called statute laws, or acts of parliament, which are originally reduced into writing before they are enacted, or receive any binding power—every such law being in the first instance formally drawn up in writing, and made, as it were, a tripartite indenture, between the king, the lords, and the commons: for without the concurrent consent of all those three parts of the legislature, no such law is, or can be made. But the kings of this realm, with the advice and consent of both houses of parliament, have power to make new laws, or to alter, repeal, or enforce the old. And this has been done in all succession of ages (A).

(A) The high court of parliament* consists of the king, in his royal political capacity; of the lords spiritual†, who sit there by succession, in respect of their baronies; of the lords temporal, who sit there in consequence of their respective dignities, which they enjoy, either by descent, or creation‡; who are called to this high and omnipotent court by a writ of summons§; of knights, citizens, and burgesses, who are respectively elected by the different counties, cities, and boroughs of the kingdom, by virtue of a writ which is issued for that purpose||. These constitute the parliament of Great Britain—“the highest and “most honourable, and absolute court of justice¶” in the kingdom. For its laws, usages, and powers, see Com. Dig. 5. v. tit. Parliament. Sir Edward Coke, in treating of the high court of Parliament, says, “there is no act of parliament but must have the consent of the lords, the commons, and the royal assent of “the king; and as it appeareth by records** and our books, whatsoever passeth “in parliament by this threefold consent, hath the force of an act of parliament††.”

* *Parliamentum*—Curia apud nos suprema: magnum trium ordinum regni concilium, vel conventus, ut cum rege de rebus arduis consultant. Colloquium quandoque dictum, et propriè; nam a Gallico (parler) venit, quod loqui significat. Vox huc a Normannis adjecta, nec antea Anglis nota, quibus Concilium illud interdum MICHEL GEMOT, i.e. Synodus magna: interdum WITENA GEMOT, i.e. sapientum Conventus; item, MICHEL SINORN, et similiter nuncupatum. Somner. Tyrrell. 9 Co. Præf. The great council, by which an Anglo-Saxon king was guided in all the main acts of government, bore the appellation of *Witena-gemot*, or the assembly of the wise men. Upon which subject, as upon most others, connected with the English constitution, the student may receive most valuable information, from Mr. Hallam's View of the Middle Ages—a work which cannot but “conduce “to stimulate the reflexion, to guide the researches, to correct the prejudices, or to

“animate the liberal and virtuous sentiments “of inquisitive youth.”

† In number twenty-six; but since the union with Ireland, four, by rotation of sessions, are added. 39 & 40 Geo. 3. c. 67.

‡ The number of the lords temporal is unlimited; it being in the power of the king to create as many as he may think proper. By the union with Ireland, twenty-eight, elected for life, by the peers of Ireland, are added. 39 & 40 Geo. 3. c. 67.

§ 4 Inst. 1. 5. 44, 45, 47.

|| Co. Lit. 109. b. 4 Inst. 1. 6. Cot. Abr. præf. 13. b. The number of knights, citizens and burgesses, since the Union with Scotland, amounts to five hundred and fifty-eight; and one hundred more since the union with Ireland. See 39 & 40 Geo. 3. c. 67. and post ch. 9.

¶ Sir Edw. Coke.

** 14 R. 2. nu. 15, and 13 H. 4. nu. 25.

†† 4 Inst. 25. cites 4 H. 7. 18. B. p. tous les justices. 7 H. 7 14. 16. 11 H. 7.

Now, statute laws, or acts of parliament, are of two kinds. First, those statutes which were made before time of memory;

If there be the consent of one or two of them, it is only an ordinance; for the difference between an act of parliament and an ordinance is, "for that the ordinance wanteth the threefold consent, and is ordained by one or two of the them *." Elsynge states the distinction thus: "what begun in the commons was only termed a petition, (for they had no power to ordain); and what begun in the lords, was styled an ordinance: *Actus Parliamenti* was an act made by the lords and commons; and it became *Statutum* when it received the king's consent." This passage is omitted in the late edition of Elsynge (1768, 12mo.) for himself erased it from the MS. from which that edition is printed.†

If an act *appears* to be passed without the assent of the commons, it is void. Mo. 824. Or, without the assent of the lords, or, of the king. Pl. Com. 79. H. Parl. 32. So, if it be by the assent of the king, the lords *spiritual only*, and the commons, it is but an *ordinance*, and no act of parliament. Or, by the king, the lords *temporal*, and commons. 4 Inst. 25. But it is not necessary, that *any* of the lords *spiritual assent*; provided there be a MAJORITY of the lords ASSEMBLED in parliament. Seld. 3. v. 2. p. 1528. So, if all the spiritual lords *assent conditionally*; for, the condition is void. 4 Inst. 35. Or, if the spiritual lords are absent. 3 Rush. 1344. So, it is *not material*, that the assent of the king, lords, and commons, be *particularly* expressed: for PER ASSENSUM PARLIAMENTI comprehends the assent of ALL. Jon. 104. So, if by the roll it appears, that the bill was sent to the lords, by the commons, *with a proviso annexed*, and no proviso is extant upon the record, yet it will be a good statute. Hob. 110. And, if the journal of parliament vary from the record, it will not prejudice, for *that* is no record. Hob. 110, 111. So, it is *not material* in what *form* it is expressed; for it may be in the form of a charter. Co. Lit. 98. 8 Co. 18, 19. Or, by way of a GRANT, by the king in parliament. Co. Lit. 98.—And therefore, if the king grants PER CONSILIUM FIDELIUM SUBDITORUM, and it has always had the reputation of an act of parliament, it is SUFFICIENT. 8 Co. 20. a. Jon. 103. So, if the act be penned, DE CONCILIO PRELATORUM, COMITUM, BARONUM, ET ALIORUM DE REGNO NOSTRO STATUIMUS, &c. 8 Co. 20. So, if it be *certified* as an act of parliament by the chancellor, when *nul tiel record* is pleaded, and a *certiorari* goes to him to certify; though the royal assent be not expressed. 3 Keb. 587.

GENERAL acts are always INROLLED by the clerk of the parliament, and delivered to the *Chancery*; which inrollment in *Chancery* makes the ORIGINAL record. PRIVATE acts are *not* inrolled, unless at the special suit of the party: but the original bill, with the assent of the lords and commons and royal assent indorsed and filed, and labelled with the other bills to which the great seal is annexed, which remained with the clerk of parliament, is the original record. Hob. 109.

27. a. Brooke prerogative, 134. Fortescue fo. 20. cap. 18. Dier 1. Mar. 92. Vide also 2 Inst. 157. 8 Co. 20. the Prince's case. Pl. Com. 79. a. Ha. Parl. 31.

* 4 Inst. 25. cites Rot. Parl. 25 E. 3. an. 16, &c. 39 E. 3. 12. 22 E. 3. 3. § H.

6. cap. 29. Dier. 4. Mar. 144. 39 E. 3. 7. Thorpe male erravit. Rot. Parl. 37 E. 3. nu. 39. 1 R. 2. nu. 56. diversity between acts of parliament and ordinances, 2 R. 2. stat. 2. nu. 28.

† Barr on Stat. 41.

and, secondly, those statutes which were made within or since time of memory. Wherein observe, that, according to a juridical account and legal signification, time within memory, is the time of limitation in a writ of right; which by the statute of Westminster 1. c. 39. (a) was settled and reduced to the beginning of the reign of king Richard I. or *ex prima coronatione regis Ricardi primi* (b); who began his reign the sixth of July 1189, and was crowned the third of September following. So that whatsoever was before that time, is before time of memory. What is since that time, is, IN A LEGAL SENSE, said to be WITHIN, or since time of memory.

And therefore it is, that those statutes, or acts of parliament, that were made before the beginning of the reign of king Richard the first, and have not since been repealed, or altered, either by contrary usage, or by subsequent acts of parliament, are now accounted part of the *lex non scripta*; being, as it were, incorporated therein, and become a part of the common law. And in truth, such statutes are not now pleadable as acts of parliament. Because what is BEFORE time of memory, is supposed without a beginning, or, at least such a beginning as the law takes notice of. But they obtain their strength by mere immemorial usage or custom (c).

And doubtless, many of those things that now obtain as common law, had their original by parliamentary acts or constitutions, made in writing by the king, lords, and commons (d); though

(a) Made at Westminster 25th April, ann. 3 Edw. 1. An. Dom. 1275. Co. Lit. 114, 115. Barrington, Obs. Stat. 67. seq.

(b) Time of memory hath been long ago ascertained by the law to commence from the reign of Richard the first, and any custom may be destroyed by evidence of its non-existence in any part of the long period, from his days to the present. This rule was adopted, when by the stat. of West. 1. c. 39. the reign of Richard I. was made the time of limitation of a writ of right. But, since by the stat. 32 Hen. 8. c. 2. this period (in a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable, that the date of legal prescription, or memory, should still continue to be reckoned from an æra so very antiquated. Black. Com. 2. vol. 31. 2 Rol. Abr. 269. pl. 16. and Hawk.

Abr. of Co. Lit. 168. But see Lit. sec. 170. and Co. Lit. 113.

(c) If found in records or histories, they ought *not* to be reputed as acts of parliament. Coim. Dig. 4. v. 334. Dr. Taylor's Elements of the Civil Law, 241. seq. and Summary of the Roman Law 113, 114, 115, 116.

(d) The common law and the statute law flow originally from the same fountain, the legislature; the statute law being the will of the legislature, remaining on record in writing; the common law, nothing else but statutes, antiently written, but which have been worn out by time. All our law began by consent of the legislature; and whether it be now law by custom, by usage, or by writing, it is the same thing. Wils. Par. 2. 348. 351. and see post chap. 4.

those acts are either now not extant, or, if extant, were made before time of memory. The evidence of the truth hereof, will easily appear; for that in many of those old acts of parliament, that were made before time of memory, and are yet extant, we may find many of those laws enacted, which now obtain merely as common law, or the general custom of the realm. Were the rest of those laws extant, probably the footsteps of the original institution of many more laws, that now obtain merely as common law, or customary laws by immemorial usage, would appear to have been at first statute laws or acts of parliament.

Those antient acts of parliament, which are ranged under the head of *leges non scriptæ*, or customary laws, as being made before time of memory, are to be considered under two periods. First, such as were made before the coming-in of king William I. commonly called the Conqueror. Or, secondly, such as intervened between his coming-in and the beginning of the reign of Richard I. which is the legal limitation of time of memory.

The former sort of these laws, are mentioned by our ancient historians, especially by Brompton; and are now collected into one volume by William Lambard, esq. in his *Tractatus de priscis Anglorum Legibus*; being a collection of the laws of the kings, Ina, Alfred (a), Edward, Athelstane, Edmond, Edgar, Ethelred, Canutus, and of Edward the confessor. Which last body of laws, compiled by Edward the confessor, as they were more full and perfect than the rest, and better accommodated to the then state of things, so they were such whereof the English were always very zealous;—as being the great rule and standard of their rights and liberties (B). Whereof more hereafter (b).

(B) As to the laws of Edward the confessor, the authenticity of those in print is controverted by Dr. Hickes.* Mr. Lambard, who published the first edition of the Anglo-Saxon Laws, informs his reader, that those called Edward the confessor's, were printed from two manuscripts, and that though one of them was very ancient, yet the other was not so old.† The most commendable circumstance of Edward the confessor's government, was his attention to the administration of justice, and his compiling, for that purpose, a body of laws, which he collected from the laws of Ethelbert, Ina, and Alfred. This compilation, though

* Hic. Thes. Ling. septen. dissert. epist. 95.

† Lan. b. Archa. 124. a.

(a) Alfred denominates himself in his will *Occidentaliū Saxorum rex*; and Asserius never gives him any other name. But his son, Edward the elder,

takes the title of *rex Anglorum* on his coins. Hallam's View, c. 8.

(b) Chap. 3 and 5.

The second sort are those edicts, acts of parliament, or laws, that were made after the coming-in of king William, commonly named the Conqueror, and before the beginning of the reign of king Richard I. and more especially are those which follow; whereof I shall make but a brief remembrance here, because it will be necessary in the sequel of this discourse (*a*), it may be more than once, to resume the mention of them. And besides, Mr. Selden, in his book called *Janus Anglorum*, has given a full account of those laws. So that at present, it will be sufficient for me briefly to collect the heads or divisions of them, under the reigns of those several kings wherein they were made.

First, the laws of king William I. These consisted in a great measure of the repetition of the laws of king Edward the confessor, and of the enforcing them by his own authority, and THE ASSENT OF PARLIAMENT, at the request of the English; and some new laws were added by himself, with the like assent of parliament, relating to military tenures, and the preservation of the public peace of the kingdom: all which are mentioned by Mr. Lambard, in the tractate before mentioned, but more fully by Mr. Selden, in his collections and observations upon Eadmerus.

Secondly, We find little of new laws after this, till the time of king Henry I. who, besides the confirmation of the laws of the confessor, and of king William I. brought in a new volume of

now lost, (for the laws that pass under Edward's name were composed afterwards), was long the object of affection to the English nation*. In truth, what were in reality the laws of Edward the confessor is much disputed by antiquaries, and our ignorance of them seems one of the greatest defects in English history†. The collection of laws in Wilkins which pass under the name of Edward, are plainly a posterior and an ignorant compilation. Those to be found in Ingulf are genuine; but so imperfect, and contain so few clauses favourable to the subject, that there is no great reason for contending for them so vehemently. It is probable, that the English meant the common law, as it prevailed during the reign of Edward; which we may conjecture to have been more indulgent to liberty than the Norman institutions. The most material articles of it were comprehended in Magna Charta. Lord Lyttelton, in his Life of Henry the Second, has bestowed some pains on this subject. Mr. Hume, though less diffuse, is more comprehensive.

* Spelm. in verbo Balliva.

† Edward the confessor, notwithstanding his Norman favourites, was endeared by the mildness of his character to the English na-

tion; and subsequent miseries (says Mr. Hallam in his View, c. 8.) gave a kind of posthumous credit to a reign, not eminent either for good fortune or wise governmen-

laws, which to this day are extant, and called the laws of king Henry I. (a) The entire collection of these is entered in the red book of the exchequer, and from thence are transcribed and published, by the care of sir Roger Twisden, in the latter end of Mr. Lambard's book before mentioned. What the success of those laws were in the time of king Stephen and king Henry II. we shall see hereafter (b): but they did not much obtain in England, and are now for the most part become wholly obsolete, and in effect quite antiquated.

Thirdly, The next considerable body of acts of parliament, were those made under the reign of king Henry II. commonly called the Constitutions of Clarendon. What they were, appears best in Hoveden and Matthew Paris, under the years of that king. We have little memory else of any considerable laws enacted in this king's time, except his assizes, and such laws as related to the forests; which were afterwards improved under the reign of king Richard I. But of this hereafter more at large (c).

And this shall serve for a short instance of those statutes, or acts of parliament, that were made before time of memory. Whereof as we have no authentical records, but only transcripts, either in our ancient historians, or other books and manuscripts; so, they being things done before time of memory, obtain at this day no further than as by usage and custom they are, as it were, engrafted into the body of the common law and made a part thereof.

And now I come to those *leges scriptæ*, or acts of parliament, which were made since or within the time of memory, viz. since the beginning of the reign of Richard I. And those I shall divide into two general heads, viz.—those we usually call the old statutes, and those we usually call the new, or later, statutes. And because I would prefix some certain time, or boundary, between them, I shall call those the old statutes, which end with the reign of king Edward II. and those I shall call the new, or later, statutes, which begin with the reign of king Edward III. and so are derived through a succession of kings and queens down to this day, by a continued and orderly series.

Touching these later sort I shall say nothing; for they all keep an orderly and regular series of time, and are extant upon record, either in the parliament rolls, or in the statute rolls of king

(a) The authenticity of the laws of Henry the first is much doubted.

(b) Chap. 7.

(c) Chap. 7.

Edward III. and those kings that follow. For excepting some few years in the beginning of king Edward III. (i.e. 2, 3, 7, 8, and 9 E. 3.) all the parliament rolls, that ever were, since that time, have been preserved, and are extant; and for the most part, the petitions upon which the acts were drawn up, or the very acts themselves.

Now therefore touching the elder acts of parliament, viz. those that were made between the first year of the reign of king Richard I. and the last year of king Edward II. we have little extant in any authentical history; and nothing in any authentical record touching acts made in the time of king Richard I. unless we take in those constitutions and assizes mentioned by Hoveden as aforesaid (a).

Neither is there any great evidence, what acts of parliament passed in the time of king John; though, doubtless, many there were both in his time, and in the time of king Richard I. But there is no record extant of them, and the English histories of those times give us but little account of those laws; only Matthew Paris (b) gives us an historical account of the *magna charta*, and *charta de foresta*, granted by king John at Running Mead, the fifteenth of June, in the seventeenth year of his reign.

And it seems that the concession of these charters was in a parliamentary way. You may see the transcripts of both charters *verbatim* in Matthew Paris, and in the red book of the exchequer. There were seven pair of these charters sent to some of the great monasteries, under the seal of king John; one part whereof, sent to the abbey of Tewkesbury, I have seen, under the seal of that king. The substance thereof differs something from the *magna charta*, and *charta de foresta*, granted by king Henry III. but not very much, as may appear by comparing them (c).

But though these charters of king John seem to have been passed in a kind of parliament, yet it was in a time of great

(a) Vide chap. 7.

(b) The former part of the history which goes under the name of Matthew Paris, to the year 1235, is supposed to have been written by Roger Wendover; but it is generally referred to as the work of Matthew Paris, who died A.D. 1259. For a concise view and character of most of our historians, either in print or MS. with an account of our records, law-books, coins, &c. the Eng-

lish historical library, by Dr. Nicolson bishop of Carlisle, may be referred to with confidence.

(c) Those who are desirous of receiving further information of these ancient charters, may see very accurate copies of them, with a learned and elegant introductory discourse, in the law tracts of Mr. Justice Blackstone. See also lord Lyttelton's History of Henry II. and the seventh chapter of this History.

confusion between that king and his nobles; and therefore they obtained not a full settlement till the time of king Henry III. when the substance of them was enacted by a full and solemn parliament.

I therefore come down to the times of those succeeding kings, Henry III. Edward I. and Edward II. The statutes made in the times of those kings, I call the old statutes; partly because many of them were made but in affirmance of the common law; and partly because the rest of them, that made a change in the common law, are yet so antient, that they now seem to have been, as it were, a part of the common law; especially considering the many expositions that have been made of them in the several successions of times, whereby as they became the great subject of judicial resolutions and decisions, so those expositions and decisions, together also with those old statutes themselves, are as it were incorporated into the very common law, and become a part of it.

In the time of those three kings last mentioned, as likewise in the times of their predecessors, there were doubtless many more acts of parliament made, than are now extant of record, or otherwise; which might be a means of the change of the common law in the times of those kings from what it was before; though all the records or memorials of those acts of parliament, introducing such a change, are not at this day extant. But of those that are extant, I shall give you a brief account, not intending a large or accurate treatise touching that matter.

The reign of Henry III. was a troublesome time, in respect of the differences between him and his barons, which were not composed till his fifty-first year, after the battle of Evesham (a). In his time there were many parliaments, but we have only one summons of parliament extant of record in his reign, viz. 49 Henry III. (b) And we have but few of those many acts of parliament that passed in his time, viz. the great charter, and *charta de foresta*, in the ninth year of his reign, which were doubtless passed in parliament. The statute (c) of Merton (d), in the

(a) Fought on the 4th of August, 1265.

(b) It does not appear that the citizens and burgesses, who were then, properly speaking, the commons of the realm, were regularly summoned at this time. All we find is, that the cities of York and Lincoln, and other

boroughs of England, were written to and required to send two of the most discreet men, &c.

(c) It seems to be only an ordinance. Barr. Obs. Stat. 41.

(d) It is called the statute of Merton, from the parliament, or rather council, sitting at the priory of Merton, in

twentieth year of his reign (a); the statute of Marlbridge (b), in the fifty-second year (c); and the *dictum sive edictum de Kenelworth* (d), about the same time; and some few other old acts.

In the time of king Edward I. there are many more acts of parliament extant than in the time of king Henry III. Yet doubtless in this king's time there were many more statutes made than are now extant. Those that are now extant, are commonly bound together in the old book of Magna Charta. By those statutes, great alterations and amendments were made in the common law. And by those that are now extant, we may reasonably guess, that there were considerable alterations and amendments made by those that are not extant: which possibly may be the real, though sudden, means of the great advance and alteration of the laws of England in this king's reign, over what they were in the time of his predecessors.

Surrey, which belonged to regular canons, according to Dugdale. Though some of the priories might have had very large and spacious houses, yet it is not probable that there could have been accommodation for what is now called a parliament, with the intervention of commons; and it should seem, from Dugdale's short account of this priory, that it was by no means largely endowed. In all the ancient palaces of the kings of England, there was a large room, or hall, for the accommodation of what was then called a parliament, which went by the name of the parliament chamber. There is such an hall, now converted into a barn, at Eltham, in Kent, which is said to have been a palace of king John, though it is now considered by eminent antiquaries as being of a later date. Barrington has little doubt but Westminster Hall was built for the same purpose. There was likewise such a room in the old palaces of the kings of Scotland; particularly at Linlithgow, and Stirling. Barr. Obs. Stat. 41.

(a) A. D. 1236

(b) Or Marlebridge, "now called" (as Sir Edward Coke, 2 Inst. 101. says) "Marleborough, a town in Wiltshire, the greatest fame whereof is the holding of this parliament there." "Henricus vero concilium convocavit Marlebrigium, quod est pagus celebris comitatus Wilcarie, qui in eo

"conventu primum leges ab se latas, et præsertim Magnæ Chartæ de concilii sententia approbandas, deinde alias condendas curavit, quæ ad statum et commodum regni maxime conducere." See Polyd. Virgil, p. 310, 314.

This town, in our law books, is called a city, and the freemen citizens. 2 Inst. 101, 39 E. 3. fo. 15.

Though Marlebridge, where this parliament was holden, is supposed to be the same with the town at present called Marlborough, yet there is some reason to doubt it, as the terminations are very different. In Saxton's maps, it is spelt Marlingesboro. The city of Lincoln, in the old statutes, is however called Nicoll, or Nicholl, which is a greater variation from the modern name. Barr. Obs. Stat. 58.

(c) A. D. 1267.

(d) The dictum de Kenelworth was an edict or award between Henry the third and those who had been in arms against him; so called, because made at Kenelworth castle, in Warwickshire, anno 51 Hen. 3. A. D. 1266. It contained a composition of those who had forfeited their estates in that rebellion, which composition was five years rent of the estates forfeited. Vide post. ch. 7. See the appendix to the last 4to. ed. of the Statutes at large, by Run. and Hale's Hist. P. C. vol. I. 50. oct. edit.

The first summons of parliament, that I remember extant of record, in this king's time, is 23 Edw. I. (a); though doubtless there were many more before this, the records whereof are either lost or mislaid. For many parliaments were held by this king before that time, and many of the acts passed in those parliaments are still extant; as, the statutes of Westminster 1, in the 3 of Edw. I.; the statutes of Gloucester, 6 Edw. I.; the statutes of Westminster 2, and of Winton, 13 Edw. I.; the statutes of Westminster 3, and of *quo warranto*, 10 Edw. I.; and divers others in other years, which I shall have occasion to mention hereafter (b).

In the time of king Edward II. many parliaments were held, and many laws were enacted. But we have few acts of parliament of his reign extant, especially of record.

And now, because I intend to give some short account of some general observations touching parliaments, and of acts of parliament passed in the times of those three princes, viz. Henry III. Edward I. and Edward II. because they are of greatest antiquity, and therefore the circumstances that attended them, most liable to be worn out by process of time, I will here mention some particulars relating to them, to preserve their memory, and which may also be useful to be known, in relation to other things.

We are therefore to know, that there are these several kinds of records of things done in parliament, or especially relating thereto, viz.—

1. The summons to parliament.
2. The rolls of parliament.
3. Bundles of petitions in parliament.
4. The statutes, or acts of parliament themselves. And,
5. The *brevia de parlamento*, which for the most part were such as issued for the wages of knights and burgesses. But with these I shall not meddle.

First, As to the summons to parliament.

These summons to parliament are not all entered of record in the times of Henry III. and Edward I.—none being extant of record in the time of Henry III. but that of 49 Hen. III.—and none

(a) The first regular summons we meet with, directed to the sheriff, for the election of citizens and burgesses, is in the 29d of Edw. I. The commons had by this time obtained some

influence. Such however was the gross inattention to their rights, that their assent was not, for some time after, held essential to the enacting of laws.

(b) Chap. 7.

in the time of Edward I. till the 23 Edw. I. (a) But after that year, they are for the most part extant of record, viz. *in dorso claus' rotulorum*, in the backside of the close rolls.

Secondly, As to the rolls of parliament, viz. the entry of the several petitions, answers and transactions in parliament. Those are generally and successively extant of record in the Tower, from 4 Edw. III. downward, till the end of the reign of Edw. IV. excepting only those parliaments that intervened between the first and the fourth, and between the sixth and the eleventh of Edward III.

But of those rolls in the times of Henry III. and Edward I. and Edward II. many are lost and few extant. Also, of the time of Henry the third, I have not seen any parliament roll. And all that I ever saw of the time of Edward I. was one roll of parliament in the receipt of the exchequer of 18 Edw. I. and those proceedings and remembrances which are in the *Liber Placitor' Parliamenti* in the Tower; beginning, as I remember, with the twentieth year of Edward I. and ending with the parliament of Carlisle, 35 Edw. I. and not continued between those years with any constant series; but including some remembrances of some parliaments in the time of Edward I. and others in the time of Edward II.

In the time of Edward II. besides the *rotulus ordinationum* of the lords ordoners, about 7 Edw. II. we have little more than the parliament rolls of 7 & 8 Edw. II. and what others are interspersed in the parliament book of Edward I. abovementioned; and as I remember, some short remembrances of things done in parliament in the 19 Edw. III.

Thirdly, As to the bundles of petitions in parliament. They were for the most part petitions of private persons, and are commonly indorsed with remissions to the several courts where they were properly determinable. There are many of those bundles of petitions; some in the times of Edward I. and Edward II. and more in the times of Edward III. and the kings that succeeded him (b).

Fourthly, The statutes, or acts of parliament themselves.

(a) And yet in the interval, between 49 Hen. 3. and 23 Edw. 1. several parliaments were holden—ten or twelve. See Pulton's Statutes.

(b) After the time of Ed. 4. no bundles of petitions are extant in the Tower.

They were either verbally communicated by the speaker, or presented in writing, and the king either assented to or denied them wholly, or in part, absolutely, or on condition. Elsyng, c. 8. Seld.

These seem as if in the time of Edward I. they were drawn up into the form of a law in the first instance, and so assented to by both houses, and the king; as may appear by the very observation of the contexture and fabric of the statutes of those times. But from near the beginning of the reign of Edward III. till very near the end of Henry VI. they were not in the first instance drawn up in the form of acts of parliament. But the petition and the answer were entered in the parliament rolls, and out of both, by advice of the judges and others of the king's counsel, the act was drawn up conformable to the petition and answer, and the act itself for the most part entered in a roll, called the statute roll, and the tenor thereof affixed to proclamation writs, directed to the several sheriffs, to proclaim it as a law in their respective counties (a). (C)

(a) The art of printing, which makes the public, and not a few individuals, the guardians of the laws;—which has created a proud public right, *the liberty of the press*; a right inseparable from the principles of a free government,

and essential to the security of the British Constitution, has long since superseded the ancient mode of promulgation by the sheriff.—The promulgation was, as lord Holt observes, but a mere act of *grace*. 1 Ld. Raym. 501.

(C) If we consult the parliament rolls, whereon the petitions of the commons are entered with the king's answers, we shall find, that to petitions of a public nature the king's assent is entered in these words, "*le roy le voet*." By such answer, the royal assent was completely given, and the bill acquired the force of a law before it passed the great seal, and was entered on the statute roll. If the distinction may be admitted, the parliament roll contained the substance, and the statute roll the form of the law. Many acts, however, though undoubtedly valid, were *not* entered on the *statute roll*; for if the bill did not demand *NOVEL LEY*; that is, if the provision required, would stand with the laws then in force, and did not alter any statute then in being; in such case, the law was complete by the royal assent on the parliament roll, without any entry on the statute roll. Such bills were usually termed *ORDINANCES*;—being such as might at any time be amended by the parliament without any statute; for one statute could not be altered but by another: and this distinction is clearly expressed in the rolls hereunder cited, viz.

Rot. Parl. 37 E. 3. nu. 38. "As the things granted in this parliament were *new*, and not known before them, the king asked the commons, if they would *have* the things so granted by way of *ORDINANCE*, or statute; And they answered, that it was good to have them by way of *ORDINANCE*, and not by statute, to the end that if any thing required amendment, it might be amended *at the next parliament*." (N. B. Among the ordinances on this roll, is one for regulating apparel; and it is observable, that "the chancellor, by the king's command, charged the commons, at their return into the country, to *shew and publish* the *ORDINANCE* of apparel, to the end that every one might wear apparel *agreeable thereto*." This serves therefore, to explain in what manner those acts, which were *not* entered on the *statute roll*, and consequently *not* proclaimed by

But because sometimes difficulties and troubles arose, by this extracting of the statute out of the petition and answer, about the latter end of Henry VI. and beginning of Edward IV. they took a course to reduce them, even in the first instance, into the full and complete form of acts of parliament; which was prosecuted (or entered) commonly in this form: "*Item quædam petitio exhibita fuit in hoc parlamento formam actus in se continens, &c.*" And abating that style, the method continues much the same; namely, that the entire act is drawn up in form, and so comes to the king for his assent.

The ancient method of passing acts of parliament being thus declared, I shall now give an account touching those acts of parliament that are at this day extant, of the times of Henry III. Edward I. and Edward II. They are of two sorts, viz. some of them are extant of record; others are extant in ancient books and memorials, but not of record. And those which are extant of record, are either recorded in the proper and natural roll, viz. the statute roll; or, they are entered in some other roll, especially in the close rolls and patent rolls, or in both. Those that are extant but not of record, are such as though they have no record extant of them, but possibly the same is lost, yet they are preserved in ancient books and monuments, and in all times have had the reputation and authority of acts of parliament.

For an act of parliament, made within time of memory, loses not its being so, because not extant of record; especially if it be a general act of parliament. For of general acts of parliament,

the sheriffs, were made known to the people.—) It may be collected from this record, that though the law demanded was *new*, yet as it was such as might stand with the old laws, and did *not* alter any statute then in force, it might pass indifferently by way of ordinance, or statute; whereas if it *changed* any *old law*, it *MUST* have been *BY STATUTE*; as is further evident from the following record. Rot. Parl. 22. E. 3. nu. 30. "The king, by the assent of the lords, made answer, "that laws and process *heretofore used* could *not* be *changed*, without making "NEW STATUTES." But after all, it must be confessed, that whatever the right was, yet so *irregular* was the *practice*, that a great number of printed acts, as Prynne observes, refute this distinction. In short, acts are, by the legislature, frequently called ORDINANCES; and ordinances are as frequently stiled acts of parliament, or statutes; and sometimes the words, *act* and *ordinance*, are coupled together. Therefore perhaps the only difference, if any, between them is, that bills entered with the royal assent on the parliament roll, were called ORDINANCES, and when entered on the statute roll, were stiled STATUTES. However they may be verbally distinguished, their operation was the same. See Lord Macclesfield's Trial.

the courts of common law are to take notice, without pleading of them. And such acts shall never be put to be tried by the record, upon an issue of *nul tiel record*, but it shall be tried by the court; who, if there be any difficulty or uncertainty touching it, or the right of pleading of it, are to use for their information ancient copies, transcripts, books, pleadings, and memorials, to inform themselves; but not to admit the same to be put in issue by a plea of *nul tiel record* (D).

For, as shall be shewn hereafter, there are very many old statutes which are admitted and obtain as such, though there be no record at this day extant thereof; nor yet any other written evidence of the same, but what is in a manner only traditional; as, namely, ancient and modern books of pleadings, and the common received opinion and reputation, and the approbation of the judges learned in the laws. For the judges and courts of justice are, *ex officio*, bound to take notice of *public* acts of parliament, and whether they are truly pleaded or not;—and therefore they

(D) A general or public act of parliament is an universal rule, that regards the whole community.*

All acts which concern the king, who is the head of the commonwealth, *are general laws*, of which the judges will take notice, without pleading. 8 Co. 28. 4 Co. 13. 77. So if they concern the queen; for she is the king's wife. Or, the prince; for he is the eldest son of the king, and heir apparent to the crown. 8 Co. 28. The st. 2 R. 2. 5. *de scandalis magnatum* is a general law; for it touches the prelates, nobles, and great officers, who are of the king's council. 4 Co. 13. So the st. 35 H. 8. which concerns the capacity of the queen. 8 Co. 28. Pl. Com. 231. a. So the st. 11 Ed. 3. which makes the Prince duke of Cornwall. 8 Co. 28. So a statute which concerns the whole SPIRITUALITY: as 21 H. 8. 13. 4 Co. 76. a. 1. Brownl. 208. So 13 El. 10. and 18 El. 11. 4 Co. 76. a. 120. b. 1. Brownl. 208. So a statute which concerns all officers in general; as the st. W. 1. 26. that no sheriff or other minister take reward, &c. 4 Co. 76. a. So a statute which concerns trade in general. 4 Co. 76. b. 1 T. R. 125. So the st. 1 Jac. 22. which relates to shoemakers, &c. is a general law. Lut. 1410. So the st. 2 Ph. & M. 11. which relates to woollen weavers, &c. for the penalties are given to the king. Skin. 429. So a statute which concerns all the lords generally, as the st. Marl. 3. 4 Co. 76. So if it concerns all persons generally, though it be but a special or particular thing; as a statute which concerns appeals, or assizes, or other particular action, *elegit*, attain, &c. the st. Mert. 6. and 4 H. 7. 17. concerning wards, 4 Co. 76. the st. W. 2. [vide W. 1. c. 20.] *de malefactoribus in parcis*; and *charta de foresta*; the st. 22 Ed. 4. 7. and 35 H. 8. 17. of woods in forests, chases, &c. 8 Co. 138. b. But an act which relates to a certain trade only, is a private one. 1 T. R. 125.

* Blac. Com. 1. V. 86.

are the triers of them. But it is otherwise of *private* acts of parliament, for they may be put in issue and tried by the record, upon *nul tiel record* pleaded, unless they are produced exemplified; as was done in the Prince's case, in Lord Coke's 9th Rep. (a) and therefore the averment of *nul tiel record* was refused in that case (b).

The old statutes or acts of parliament that are of record, as is before said, are entered either upon the proper statute roll, or some other roll in chancery.

The first statute roll which we have is in the Tower; it begins with *Magna Charta* and ends with Edward III. and is called

(a) 8 Co. 28.

(b) The judges ought to take notice of a GENERAL law, for they are to determine whether it be a statute or not. Co. Lit. 98. b. Dy. 93. 1 Lev. 296. and therefore a man can NOT plead NUL TIEL RECORD to it. 8 Co. 28. a. So it shall NOT be proved by a journal, Hob. 110. or alleged, that the assent of the Commons was conditional. Mo. 824. But a statute which concerns only a particular species, a particular thing, or a particular person, is deemed a PRIVATE ACT, of which the judges are not bound to take any notice, unless it be SPECIALLY pleaded. 4 Co. 76. a. 1 T. R. 125. A statute which relates to a particular place or town, will be considered as a PRIVATE law, though it may concern ALL persons. 4 Co. 76. b. Skin. 350. And in a GENERAL act, there may be a PRIVATE clause. 10 Co. 57. b.

But now, when any particular law passes, which the legislature mean should operate as a public act, it is, in general, enacted, that the act shall be deemed a public act, and be judicially taken notice of as such, without specially pleading the same.* Where the words of a statute are doubtful, general usage may be applied to explain them; but where they are clear, the usage of a particular place cannot control them. 1 T. R. 723. So, though the preamble of an act cannot control the clear and positive words of the enacting part, it may explain them, if ambiguous. 4 T. R. 793. and where a statute gives accumulative damages to the party grieved, it is still but a civil remedy. 2 T. R. 154.

The construction of statutes, though relating to matters of an ecclesiastical nature, belongs to the superior Courts of common law. 5 E. R. 345. So statutes, allowing certain privileges to the members of the universities are confined to those of the two *English* universities; unless otherwise expressed. 1 T. R. 49. The bare recital, in a subsequent statute, is not sufficient to repeal the positive provisions of a former one. 2 T. R. 365. and if a statute expire, and afterwards be revived again by another statute, the law derives its force from the first. 4 T. R. 109. So a contract declared by statute to be illegal, is not made good by a subsequent repeal of the statute. 1 H. B. 65. So, where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only a certain time, the prior law does not revive after the repealing law is spent, unless the intention of the legislature to that effect be expressed. 3 E. R. 205. But a statute introductive of a new qualification as to the subject matter, though penned in the affirmative, repeals a former statute, concerning the same matter. 9 E. R. 44.

In general, an act of parliament which is to take place "*from and after the passing of the act*" operates by general relation from the first day of the Session. 4 T. R. 660. But by 33 Geo. 3. c. 13. the operation of every statute is to commence from the time of receiving the Royal Assent; unless any other period is appointed in the act.

* Co. Lit. 99. a. edit. Hargrave.

Magnus Rotulus Statutor. There are five other statute rolls in that office, of the times of Richard II. Henry IV. Henry V. Henry VI. and Edward IV.

I shall now give a scheme of those ancient statutes, of the times of Henry III. Edward I. and Edward II. that are recorded in the first of those rolls, or elsewhere, to the best of my remembrance, and according to those memorials I have long had by me, viz.

Magna Charta. Magno Rot. Stat. membr. 40. & Rot. Cartar. 28. E. 1. membr. 16.

Charta de Foresta. Mag. Rot. Stat. membr. 19. & Rot. Cartar. 28. E. 1. membr. 26.

Stat. de Gloucestre. Mag. Rot. Stat. membr. 47.

Westm. 2. Rot. Mag. Stat. membr. 47.

Westm. 3. Rot. Clauso, 18. E. 1. membr. 6. Dorso.

Winton. Rot. Mag. Stat. membr. 41. Rot. Clauso, 8. E. 3. membr. 6. Dorso. Pars. 2. Rot. Clauso, 5. R. 2. membr. 13. Rot. Paten. 25. E. 1. membr. 13.

De Mercatoribus. Mag. Rot. Stat. membr. 47. in Dorso.

De Religiosis. Mag. Rot. Stat. membr. 47.

Articuli Cleri. Mag. Rot. Stat. membr. 34. Dorso. 2. Pars. Pat. E. 1. 2. membr. 34. 2. Pars. Pat. 2. E. 3. membr. 15.

De hiis qui ponendi sunt in Assisis. Mag. Rot. Stat. membr. 41.

De Finibus levatis. Mag. Rot. Stat. membr. 37.

De Defensione Juris liberi Parliam. Lib. Parl. E. 1. fo. 32.

Stat. Eborum. Mag. Rot. Stat. membr. 32.

De Coniunctis Infeofatis. Mag. Rot. Stat. membr. 34.

De Escaetoribus. Mag. Rot. Stat. membr. 35. Dorso, & Rot. Claus. 29. E. 1. membr. 14. Dorso.

Stat. de Lincolne. Mag. Rot. Stat. membr. 32.

Stat. de Priscis. Rot. Mag. Stat. membr. 33. in *Schedula de libertatibus perquirendis*, vel Rot. Claus. 27. E. 1. membr. 24.

Stat. de Acton Burnel. Rot. Mag. Stat. membr. 46. Dorso, & Rot. Claus. 11. E. 1. membr. 2.

Juramentum Vicecomit. Rot. Mag. Stat. membr. 34. Dorso, & Rot. Claus. 5. E. 2. membr. 23.

Articuli Stat. Gloucestriæ. Rot. Claus. 2. E. 2. Pars. 2. membr. 8.

De Pistoribus & Braciatoribus. 2. Pars, Claus. vel Pat. 2. R. 2. membr. 29.

De asportatis Religiosorum. Mag. Rot. Stat. membr. 33.

Westm. 4. De Vicecomitibus & Viridi Cæra. Rot. Mag. Stat. membr. 33. in Dorso.

Confirmationes Chartarum. Mag. Rot. Stat. membr. 28.

De Terris Templariorum. Mag. Rot. Stat. membr. 31. in Dorso, & Claus. 17. E. 2. membr. 4.

Litera patens super Prisis bonorum Cleri. Rot. Mag. Stat. membr. 33. in Dorso.

De Forma mittendi Extractas ad Scaccar. Rot. Mag. Stat. membr. 30. & membr. 36. in Dorso.

Statutum de Scaccar. Mag. Rot. Stat.

Statutum de Rutland. Rot. Claus. 12. E. 1.

Ordinatio Forestæ. Mag. Rot. Stat. membr. 30. & Rot. Claus. 17. E. 2. Pars. 2. membr. 3.

According to a strict enquiry made about thirty years since, these were all the old statutes of the times of Henry III. Edward I. and Edward II. that were then to be found of record; what other statutes have been found since, I know not.

The *ordinance* called Butler's, for the heir to punish waste in the life of the ancestor, though it be of record in the parliament book of Edward I. yet it never was a statute, nor ever so received; but only some constitution of the king's counsel, or lords in parliament, and which never obtained the strength or force of an act of parliament (a).

Now the statutes that ensue, though most of them are unquestionable acts of parliament, yet are NOT of record that I know of, but only their memorials preserved in ancient printed and manuscript books of statutes; yet they are at this day, for the most part, generally accepted and taken as acts of parliament, though some of them are now antiquated and of little use; viz.

The statutes of Merton, Marlbridge, Westm. 1. Explanatio Statuti Gloucestriæ, De Champertio, De Visu Franklegii, De Pane & Cervisia, Articuli Inquisitionis super stat. de Winton, Circumspecte Agatis, De Districione Scaccarii, De Conspirationibus, De Vocatis and Warrant. Statut. de Carliol, De Prærogativa Regis, De Modo faciendi Homag. De Wardis & Releivis, Dies Communis in Banco, Stat. de Bigamis, Dies communes in

(a) Whatever was begun by the commons, was anciently termed *Petition*; for they had no jurisdiction, or power to *ordain*; and whatever was commenced by the lords, an *ordinance*;

the statute was an act made by the lords and commons, and consented to by the King. Elsyn. c. 1. 4 Inst. 25. 186. Rot. Parl. 37 Ed. 3. no. 38.

Banco in casu consimili. Stat. Hiberniæ, De Quo Warranto, De Essoin calumpniand. Judicium Collistrigii, De Frangentibus Prisonar'. De Malefactoribus in Parcis, De Consultationibus, De Officio Coronatoris, De Protectionibus, Sententia lata super Chartas, Modus levandi Fines, Statut. de Gavelet, De Militibus, De Vasto, De Anno Bissextili, De Appellatis, De Extenta Manerii, Compositio Mensarum vel Computatio Mensarum, Stat. de Quo Warranto, Ordinatio de Inquisitionibus, Ordinatio de Foresta, De Admensura Terræ, De Dimissione Denarior. Stat. de Quo Warranto Novum, Ne Rector prosternat Arbores in Cæmeterio, Consuetudines, & Assisa de Foresta, Compositio de Ponderibus, De Tallagio, De Visu Terræ & Servitio Regis, Compositio Ulnarum & Particarum, De Terris amortizandis, Dictum de Kenelworth, &c.

From whence we may collect these two observations, viz.

First, that although the record itself be not extant, yet general statutes made within time of memory, namely, since 1. *Richardi primi*, do not lose their strength, if any authential memorials thereof are in books, and seconded with a general received tradition attesting and approving the same (a).

Secondly, that many records, even of acts of parliament, have in long process of time been lost, and possibly the things themselves forgotten at this day; which yet, in or near the times wherein they were made, might cause many of those authoritative alterations in some things touching the proceedings and decisions in law; the original cause of which change being otherwise at this day hid and unknown to us. And indeed, histories and annals give us an account of the suffrages of many parliaments, whereof we at this time have none, or few footsteps extant in records or acts of parliament. The instance of the great parliament at Oxford, about the fortieth of Henry III. may, among many others of like nature, be a concurrent evidence of this. For though we have mention made in our histories of many constitutions made in the said parliament at Oxford, and which occasioned

(a) As there are some statutes in print which are not to be found on record, so there are several on record which have never yet been printed. Sir Edw. Coke has enumerated many of this kind. 8. Rep. the Prince's case. But the reader will meet with several in the appendix to my quarto edition

of the Statutes at large, not noticed by Coke or any other person; some of which afford not only gratification to the antiquary, but information to the lawyer and the historian. See also the valuable Index to the Statutes at large, lately published by Mr. Raithby.

much trouble in the kingdom, yet we have no monuments or RECORD concerning that parliament, or what those constitutions were.

And thus much shall serve touching those old statutes or *leges scriptæ*, or acts of parliament, made in the times of those three kings, Henry III. Edward I. and Edward II. Those that follow in the times of Edward III. and the succeeding kings, are drawn down in a continued series of time, and are extant of record in the parliament rolls, and in the statute rolls, without any remarkable omission; and therefore I shall say nothing of them.

CHAP. II.

Concerning the lex non scripta, i. e. the common or municipal law of this kingdom (a).

IN the former chapter, I have given you a short account, of that part of the laws of England, which is called *lex scripta*; namely, statutes or acts of parliament, which in their original formation are reduced into writing, and are so preserved in their original form, and in the same stile and words wherein they were first made. I now come to that part of our laws called *lex non scripta*, under which I include, not only general customs, or the common law properly so called, but even those more *particular* laws and customs, applicable to certain courts and persons, whereof more hereafter.

And when I call those parts of our laws *leges non scriptæ*, I do not mean as if those laws were only oral, or communicated from the former ages to the later, merely by word; for all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty: for as the civil and canon laws have their *responsa prudentum consilia et decisiones*, i. e. their canons, decrees, and decretal determinations, extant in writing; so those laws of England which are not comprised under the title of acts of parliament, are for the most part extant in records of pleas, proceedings, and judgments; in books of reports, and judicial decisions; in tractates of learned men's arguments and opinions, preserved from antient times, and still extant in writing.

But I therefore stile those parts of the law *leges non scriptæ*, because their authoritative and original institutions are not set down in writing in that manner or with that authority that acts of parliament are; but they are grown into use, and have acquired their binding power and the force of laws, BY A LONG AND IMMEMORIAL USAGE, and by the strength of custom and

(a) See the third section to the Introduction of Blackstone's Comments-

ries; and the case of *Burdett v. Abbot*, 14 East. 1.—and 4 Taunt. 401.

reception in this kingdom (a). The matters indeed, and the substance of those laws, are in writing, but the formal and obliging force and power of them grows by long custom and use, as will fully appear in the ensuing discourse.

The municipal laws of this kingdom, which I thus call *leges non scriptæ*, are of a vast extent, and indeed, include in their generality, all those several laws which are allowed as the rule and direction of justice and judicial proceedings, and which are applicable to all those various subjects about which justice is conversant. I shall, for more order, and the better to guide my reader, distinguish them into two kinds, *viz.*

First, The common law, as it is taken in its proper and usual acceptation.

Secondly, Those particular laws, applicable to particular subjects, matters, or courts.

Touching the former, *viz.* the common law, in its usual and proper acceptation. This is that law, by which proceedings and determinations, in the king's ordinary courts of justice, are directed and guided. This directs the course of descents of lands, and the kinds; the natures, and the extents and qualifications of estates; therein also, the manner, forms, ceremonies, and solemnities of transferring estates from one to another; the rules of settling, acquiring, and transferring of properties; the forms, solemnities, and obligation of contracts; the rules and directions for the exposition of wills, deeds, and acts of parliament; the process, proceedings, judgments, and executions of the king's ordinary courts of justice; the limits, bounds, and extents of courts, and their jurisdictions; the several kinds of temporal offences and punishments at common law, and the manner of the application of the several kinds of punishments; and infinite more particulars, which extend themselves as large, as the many exigencies in the distribution of the king's ordinary justice requires.

And besides these more common and ordinary matters to which the common law extends, it likewise includes the laws applicable to divers matters of very great moment. And though by reason of that application, the said common law assumes divers denominations, yet they are but branches and parts of it; like as the same ocean, though it many times receives a different name

(a) The Roman law, *de jure non scripto*, says, *sine scripto jus venit, quod usus approbavit; nam diu-* *turni mores, consensu utentium comprobati, legem imitantur.* Inst., l. 1. t. 2. s. 9.

from the province, shire, island, or country to which it is contiguous, yet these are but parts of the same ocean.

Thus the common law includes *lex prerogativa* (a), as it is applied with certain rules to that great business of the king's prerogative. So it is called *lex forestæ*, as it is applied under its special and proper rules to the business of forests. So it is called *lex mercatoria* (b), as it is applied under its proper rules to the business of trade and commerce. And many more instances of like nature may be given. Nay, the various and particular customs of cities, towns and manors, are thus far parts of the common law (c), as they are applicable to those particular places, which will appear from these observations, viz.

First, the common law does determine what of those customs are good and reasonable, and what are unreasonable and void. Secondly, the common law gives to those customs that it adjudges reasonable, the force and efficacy of their obligation. Thirdly, the common law determines what is that continuance of time, that is sufficient to make such a custom. Fourthly, the common law does interpose and authoritatively decide the exposition, limits and extension of such customs.

This common law, though the usage, practice, and decisions of the king's courts of justice may expound and evidence, and be of great use to illustrate and explain it, yet it cannot be authoritatively altered or changed but by act of parliament. But of this common law, and the reason of its denomination, more at large hereafter.

Now, secondly, as to those particular laws before mentioned, which are applicable to particular matters, subjects, or courts. These make up the second branch of the laws of England, which I include under the general term of *leges non scriptæ*. By those particular laws, I mean the laws ecclesiastical and the civil law, so far forth as they are admitted in certain courts, and certain matters allowed to the decision of those courts, whereof hereafter.

It is true that those civil and ecclesiastical laws, are indeed written laws; the civil law being contained in their pandects and the institutions of Justinian, &c. their imperial constitutions or

(a) Blac. Com. 1. 1. c. 7.

(b) 8 Rep. 126. Cro. Car. 347. It is

a maxim of law, that "cuilibet in sua
"arte credendum est."

(c) Blac. Com. 1. v. 74. seq.

codes answering to our *leges scriptæ*, or statutes (a); and the civil or ecclesiastical laws, contained for the most part, in the canons and constitutions of councils and popes, collected in their *Decretum Gratiani*, and the decretal epistles of popes; which make up the body of their *corpus juris canonici*; together with huge volumes of councils and expositions, decisions, and treatises of learned civilians and canonists, relating to both laws. So they may seem, at first view, very improper to rank these under the branch of *leges non scriptæ*, or unwritten laws.

But I have for the following reason ranged these laws as the unwritten laws of England, *viz.* because it is most plain, neither the canon law, nor the civil law, have any obligatory laws, within this kingdom, upon any account that the popes or emperors made those laws, canons, rescripts, or determinations, or, because Justinian compiled their *corpus juris civilis*, and his edicts confirmed and published the same as authentical because this, or that council, or pope, made those or these canons or decrees; or because Gratian, or Gregory, or Boniface, or Charlemagne, did, as much as in them lay, authenticate this or that set of canons or institutions (b). For the king of England does not recognise any foreign authority, as superior, or equal, to his in this kingdom; neither do any laws of the pope, or emperor, though they are such, bind here. But all the strength that either the civil or imperial laws have obtained in this kingdom, is only because they have been received and admitted, either by the consent of parliament, and so are part of the statute laws of the kingdom, or else, by immemorial usage and custom in some particular courts, and no otherwise. And therefore, as far as such laws are received and allowed of here, so far they obtain and no farther; and the authority and force they have here is not founded on, but derived from themselves. For they bind no more with us, than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which

(a) For a correct and concise idea of the Roman jurisprudence, and a succinct account of the code, pandects, novels, and institutes of Justinian, see Gib. Hist. 5 v. oct. c. 44. and Anc. Univ. Hist. vol. xiv. 465. The vain titles of the victories of Justinian (says Gibbon) are crumbled into dust; but

the name of the legislator is inscribed on a fair and everlasting monument. See *post*, Cap. VII.

(b) A truth which stood in need of proof. Hale in this instance has been thought rather to possess the warmth of a partizan, than the coolness of an historian.

gives them their authoritative essence, and qualifies their obligation (A).

And hence it is, that even in those courts where the use of those laws is indulged, according to that reception which has been allowed them, if they exceed the bounds of that reception, by extending themselves to other matters than has been allowed them; or if those courts proceed according to that law, when it is controuled by the common law of the kingdom; the common law does and may prohibit and punish them: and it will not be a sufficient answer for them to tell the king's courts, that Justinian or pope Gregory have decreed otherwise (a). For we are not bound

(A) All the strength that either the papal or the imperial laws have obtained in this, or indeed in any other State in Europe, is only because they have been admitted and received, by immemorial usage and custom, in some particular cases and in some particular courts; then, to use the words of Mr. justice Blackstone, they form a branch of the *leges non scriptæ*, or customary law; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is declared by the express and remarkable words of the statute 25 Hen. 8. c. 21. intituled, "the act concerning Peter-pence and Dispensations." "Your grace's realm, (says the statute) recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made and obtained WITHIN this realm, for the wealth of the same, or to such other as by sufferance of your grace, and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used amongst them, and have bound themselves BY LONG USE AND CUSTOM to the observance of the same, not as to the observance of laws of any foreign prince, potentate or prelate, but as to the CUSTOMED and antient laws of this realm, originally established as laws of the same, by the said sufferance, consent, and custom, and none otherwise." For an elegant enquiry into the canon and Roman law, and when the study of law, as a science, became a distinct employment, see Dr. Robertson's Hist. Emp. Cha. V. oct. 1 v. 74, 76, 78, 81, 381. and note 25 of that admirable work. 2 Inst. 97. Dav. 70.

(a) For which reason, it becomes highly necessary for every civilian and canonist, who would act with safety as a judge, or with reputation as an advocate, to know in what cases, and how far, the English laws have given sanction to the Roman; in what points the latter are rejected; where they are both so intermixed and blended together, as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of

which enquiry the university of Oxford has for more than a century so thoroughly seen, that in her statutes (tit. vii. sect. 2.) she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "*quia juris civilis studio*" "*soa decet haud imperitos esse juris*" "*municipalis, et differentias exteri patrie juris notas habere.*" And the statutes of the university of Cambridge (stat. Eliz. R. c. 14. Cowell Institut. in proemio) speak expressly to the same

by their decrees further, or otherwise, than as the kingdom here has, as it were, transposed the same into the common and municipal laws of the realm; either by admission of, or by enacting the same, which is that alone which can make them of any force in England (B). I need not give particular instances herein; the truth thereof is plain and evident, and we need go no further than the statutes of 24 H. 8. c. 12. 25 H. 8. c. 19, 20, 21. and the learned notes of Selden upon Fleta, and the records there cited. Nor shall I spend much time touching the use of those laws in the several courts in this kingdom; but will only briefly mention some few things concerning them.

There are three courts of note, wherein the civil, and in one of them the canon or ecclesiastical, law has been, with certain restrictions, allowed in this kingdom, viz. First, the courts ecclesiastical of the bishops, and their derivative officers. Secondly, the admiralty court. Thirdly, the *curia militaris*, or court of the constable and marshal, or persons commissioned to exercise that jurisdiction. I shall touch a little upon each of these.

First, the ecclesiastical courts. They are of two kinds, viz. First, such as are derived immediately by the king's commission; such was formerly the court of high commission; which though, without the help of an act of parliament, it could not in matters of ecclesiastical cognizance, use any temporal punishment or censure, as fine, imprisonment, &c. (a) yet even by the common law, the kings of England, being delivered from papal usurpation, might grant a commission to hear and determine ecclesiastical causes and offences, according to the king's ecclesiastical law, as Cawdry's case, Coke's fifth Report. Secondly, such as are not

(B) In the primitive church, the laity were present at all synods; when the Empire became Christian, no canon was made without the emperor's consent, which included that of the people; he having in himself the whole legislative power, which our kings have not. If therefore the king and clergy make a canon, it binds the clergy in *re ecclesiastich*, but does not bind laymen, who are not represented in convocation; whose consent is neither asked nor given. 1. Salk. 412. 12 Co. 72. 2 Inst. 57. 647, 653, 657. 2 Rol. Abr. 226, 454. Mo. 782. Br. Ordinary, 1. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palmer, 379. 3 Salk. 318. 2 Ventr. 44. 2 Lev. 222. 2 Inst. 97. Cases temp. lord Hardwicke, 57, 326, 395. 2 Stran. 1057. And see, on the ecclesiastical power, during the middle ages, Hallam's View, c. 7.

effect. Blac. Com. 1. v. 15. Seld. in (a) 11 Co. 44. a. Gibs. Cod. Fletam. 5. Rep. Caudrey's case, passim. præf. 2 Inst. 509.

derived by any immediate commission from the king. But the laws of England have annexed to certain offices, ecclesiastical jurisdiction, as incident to such offices. Thus every bishop by his election and confirmation, even before consecration, had ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese (a). And divers abbots anciently, and most archdeacons at this day (b), by usage, have had the like jurisdiction within certain limits and precincts.

But although these are *judices ordinarii*, and have ecclesiastical jurisdiction annexed to their ecclesiastical offices, yet this jurisdiction ecclesiastical *in foro exteriori* is derived from the crown of England. For there is no external jurisdiction, whether ecclesiastical or civil, within this realm, but what is derived from the crown. It is true, both anciently and at this day, the process of ecclesiastical courts runs in the name, and issues under the seal, of the bishop; and that practice stands so at this day by virtue of several acts of parliament, too long here to recount. But that is no impediment of their deriving their jurisdictions from the crown. For till 27 H. 8. cap. 24. the process in counties palatine, ran in the name of the counts palatine, yet no man ever doubted but that palatine jurisdictions were derived from the crown (c).

Touching the severance of the bishop's consistory from the sheriff's court, see the charter of king William I. and Mr. Selden's notes on Eadmerus. And see the fifth chapter of this History (d).

Now the matters of ecclesiastical jurisdiction are of two kinds, criminal and civil.

The criminal proceedings extend to such crimes, as by the laws of this kingdom are of ecclesiastical cognizance; as heresy, fornication, adultery, and some others; wherein their proceedings are, *pro reformatione morum, & pro salute animæ*. And the reason why they have cognizance of those and the like offences, and not of others, as murder, theft, burglary, &c. is not so much from the nature of the offence; for surely the one is as much a sin as the

(a) So, if a serjeant hath a patent from the king, appointing him to be C. J. of the C. P. he may take a cognizance of a fine, before he be sworn, without *dedim' pot.* Co. on Fines.

(b) For instance, the archdeacon of Richmond, the dean of Battle, &c.

(c) Every county palatine had *jura regalia*, and no writ of the king, would

run thither, except a writ of error;—which, being the dernier resort, and last appeal, is excepted in all their charters. David. 62. Dy. 321.

(d) For the various species of courts ecclesiastical, see a brief account in the third volume of Blackstone's Commentaries, from page 61 to 68.

other; and therefore if their cognizance were of offences *quatenus peccata contra Deum*, it would extend to all sins whatsoever, it being against God's law; but the true reason is, because the law of the land has INDULGED unto that jurisdiction the conuzance of some crimes, and not of others.

The civil causes committed to their cognizance, wherein the proceedings are *ad instantiam partis*, ordinarily are matters of tithes; rights of institution and induction to ecclesiastical benefices; cases of matrimony and divorces; testamentary causes, and the incidents thereunto; as insinuation or probation of testaments, controversies touching the same, and of legacies of goods and monies, &c.

Although *de jure communi* the cognizance of wills and testaments does not belong to the ecclesiastical court, but to the temporal or civil jurisdiction; yet *de consuetudine Angliæ pertinet ad judices ecclesiasticos*, as Linwood himself agrees, *Exercit. de Testamentis*, cap. 4. *in Glossa*. So that it is the custom or law of England that gives the extent and limits of their external jurisdiction *in fora contentioso* (a).

The rule by which they proceed is the canon law, but not in its full latitude; and only so far as it stands uncorrected, either by contrary acts of parliament, or the common law and custom of England. For there are divers canons made in ancient times, and decretals of the popes, that never were admitted here in England, and particularly in relation to tithes; many things being by our laws privileged from tithes, which by the canon law are chargeable, (as timber, ore, coals, &c.) without a special custom subjecting them thereunto (C).

(a) Hob. 84. 296. Dav. 51. 97. Brac. l. 2. c. 26. s. 2. Perk. s. 486. Plowd. 279. Blac. Com. 3. v. 87.

(C.) Keilw. 181. The canon law is a collection of ecclesiastical constitutions, decisions, and maxims, taken partly from Scripture, partly from the ancient Councils, and partly from the decrees of Popes, and the reports and sayings of the primitive Fathers, whereby all matters of polity in the Roman church are regulated.

The canon law which obtained throughout the west, till the twelfth century, was the collection of canons made by Dionysius Exiguus in 530, the capitularies of Charlemagne, and the decrees of the Popes, from Siricius to Anastasius. No regard was had to any thing not comprized in these; and the French, still maintain the rights of the Gallican church, to consist in their not being obliged to admit any thing else, but to be at liberty to reject all innovations made in the

Where the canon law, or the *Stylus Curia*, is silent, the civil law is taken in as a director; especially in points of exposition and determination, touching wills and legacies.

canonical jurisprudence since that compilation, as well as papal decrees before Siricius.

Indeed, between the eighth and eleventh centuries, the canon law was mixed and confounded with the papal decrees, from St. Clement to Siricius, which till then had been unknown. This gave occasion to a new reform, or body of the canon law; which is the collection still extant under the title of *Concordia Discordantium Canonum*, first made by Ivo in 1114, and perfected in 1151 by Gratian, a Benedictine monk, from Texts of scripture, Councils, and sentiments of the Fathers, in the several points of ecclesiastical polity; and containing those constitutions which have been denominated, by way of eminence, the Decrees, and forming the first part of the canon law. It is now generally known by the name of the *Decretum* of Gratian, which was formed in imitation of the Pandects of Justinian; and is a confused, immethodical compilation, full of errors and forgeries. The second part of the canon law consists of the decrees of the Popes, from the time of Pope Alexander III. to Pope Gregory IX. and published under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*.

In 1298 Pope Boniface VIII. continued the papal decrees as far as his time, under the title of *Sextus Decretalium*. To these, Pope John XXII. added the Clementines, or the five books of the constitution of his predecessor Clement V. first published about the year 1317. And to all these were afterwards added, twenty constitutions of the said Pope John, called the *Extravagantes*; and some other constitutions of his successors called *Extravagantes Communes*. These are usually called the Decretals.

All these compose the body of the canon law; which, including the comments, make three volumes in folio; the rule and measure of church government. Indeed with us, since the Reformation, the canon law has been much abridged and restrained; only so much of it obtaining, as is consistent with the common and statute laws of the realm, and the doctrine of the established church. Besides the foreign canon law, we have our legatine and provincial constitutions. In the reign of Henry VIII. it was enacted, that the canon law should be reviewed, and till that review took place, such canons, constitutions, ordinances, and synodals provincial, as had been made, and were not repugnant to the law of the land, or the king's prerogative, should be used and executed. The review was proposed again in the reign of Edward VI. and of Queen Elizabeth; but as it was never accomplished, the authority of the canon law in England depends upon the statute of 25 Henry VIII. c. 19. which was repealed indeed by Queen Mary*, but again revived by 1 Eliz. c. 1.

The constitutions and canons made in the convocation of the province of Canterbury in 1603, though ratified by the king, and soon after adopted in the province of York, never obtained a parliamentary confirmation; and it has been therefore adjudged, that they do not bind the laity, however the clergy may regard them. *Str.* 1057.

* 1 and 2 Ph. and M. c. 8.

But things that are of temporal cognizance only, cannot by charter be delivered over to ecclesiastical jurisdiction, nor be judged according to the rules of the canon or civil law; which is *aliud examen*, and not competent to the nature of things of common law cognizance. And therefore, Mich. 8. H. 4. Rot. 72 *coram Rege*, when the chancellor of Oxford proceeded according to the rule of the civil law in a case of debt, the judgment was reversed in B. R.—Wherein the principal error assigned was because they proceeded *per legem civilem ubi quilibet leges dominus regis regni sui Angliæ in quibuscunque placitis & querelis infra hoc regnum factis & emergentibus de iure tractari debet per communes leges Angliæ*. And although king H. 8. 14 anno regni sui, granted to the university a liberal charter, to proceed according to the use of the university, viz. by a course much conformed to the civil law, yet that charter had not been sufficient, to have warranted such proceedings, without the help of an act of parliament. And therefore in 13 Eliz. an act passed, whereby that charter was in effect enacted; and 'tis thereby that at this day they have a kind of civil law procedure, even in matters that are of themselves of common law cognizance, where either of the parties to the suit are privileged (a).

The coercion or execution of the sentence in ecclesiastical courts, is only by excommunication of the person contumacious and upon signification thereof into chancery, a writ *de excommunicatione capiendo* issues, whereby the party is imprisoned till obedience yielded to the sentence (b). But besides this coercion

On the use of the canon law, what shall be so called, and what canons bind see Com. D. 2. v. oct. 165. and the elaborate judgment of lord Hardwicke in the case of Middleton, and wife, v. Crofts, 2 Atk. 650. And as to this general supremacy, affected by the Roman church over mankind, in the twelfth and thirteenth centuries, see Hallam's View, c. 7.

(a) Vide 13 Eliz. c. 29. and Blac. Com. 3. v. 83, 84, 85.

(b) The writ proceeds *ex gratia Regis*; and if any one be unjustly excommunicated, he may not only sustain an action against the bishop, but the bishop may be indicted at the suit of the king. 2 Inst. 623. Dr. and Stud. lib. 2. c. 32. See also the case of Beaurain v. Sir W. Scott, tried 6 Mar. 1813, before lord Ellenborough, and published in 1814. Excommunication, in the Saxon times, was indeed pronounced by

the clergy, but determined by the law which, in the first conception, was framed in parliament. Bac. on Sel. fo. 59. c. 39. and because the power of excommunication, and its consequences are indulged to the ecclesiastical courts who have it not *de jure*, in all cases the writ of *significavit*, whenever the party is excommunicated, must not only state the suit, but expressly state the cause of excommunication. 2 Inst. 615, 623. F. N. B. 64. f.

THE SENTENCES of the ecclesiastical courts, touching some matters, do introduce a REAL EFFECT, without any other execution. As a divorce *à vinculo matrimonii*, for the causes of consanguinity, precontract, or frigidity, do induce a legal dissolution of the marriage (a). So a sentence of deprivation from an ecclesiastical benefice, does by virtue of the very sentence, without any other coercion or execution, introduce a full determination of the interest of the person deprived (b).

And thus much concerning the ecclesiastical courts, and the use of the canon or civil law in them, as they are the rule and direction of proceedings therein (D).

(a) Because such marriages were void, *ab initio*. 1 Sid. 13. Dy. 105. pl. 17. 2 Inst. 93. 4 Co. 29.

(b) Deprivation, is in some degree subject to the temporal jurisdiction; for a deprivation may be remitted by a pardon, unless where an act of parliament is interposed. The parson of Isbock in Leicestershire was deprived for adultery, and the offence was afterwards

pardoned, and adjudged that he should become parson again, without any declaratory sentence that the deprivation was null; 1st. because the judgment of the pardon belongs to the temporal court; and 2dly. because the foundation of the sentence being discharged, the dependants must be so too. 6 Co. 13. b. Dy. 135. pl. 19. Hob. 167. 293.

(D) Numerous authorities may be educed, to prove that the power of the ecclesiastical courts has been recognised by common law, and that, in general, their decisions are considered as conclusive, upon every question over which they have been accustomed to exercise original jurisdiction. The case of the duchess of Kingston however, affords considerable information on this subject.

In the year 1776, her grace was tried before the peers in parliament, for bigamy; the indictment stating that she, "being the wife of Augustus John Hervey, feloniously did marry and take to husband Evelyn Pierrepont, duke of Kingston, her former husband being then alive." After she had pleaded to the indictment, and before the case on the part of the prosecution was entered into, she observed, that in respect to the supposed contract of marriage with Mr. Hervey, and which was the sole ground of prosecution, she had, prior to her marriage with the duke of Kingston, instituted a suit in the consistory court of the bishop of London *causa jactitationis matrimonii*; in which suit Mr. Hervey was the party libelled, and of course the party defendant; that though in his defence he insisted on the marriage, yet the court ecclesiastical decreed that she was free from any matrimonial contract with Mr. Hervey; that the sentence being unreversed and unimpeached, was, as she humbly conceived, conclusive; she therefore inferred that no other evidence ought to be received in respect to that pretended marriage; for as a court of competent jurisdiction had decided the point, it would not only be illegal, but in vain, to call parole evidence to substantiate the fact.

After some altercation, the proceedings in the suit of jactitation were permitted to be read *de bene esse*. By the sentence it was in form decreed that the

Secondly, the second special jurisdiction wherein the civil law is allowed, at least as a director or rule in some cases, is the

defendant was "free from all matrimonial contracts or espousals; more especially with the said Augustus John Hervey," who was, by the sentence, enjoined to "perpetual silence as to the premises libellate."

This sentence being read, the counsel for her grace, after stating that she had, subsequent to the sentence and in confidence of its legality, married the late duke of Kingston, observed, that they did not know of any court in which the constitution of this kingdom had vested authority to decide on the rights of marriage, but the ecclesiastical; and they believed it would not now be contended, that the courts of common law had any such original jurisdiction. They admitted that marriage might incidentally be determined in the courts of common law, because such determinations were absolutely necessary to the due administration of justice; but they insisted, that whenever the proper *forum* had decided on the question, the courts of common law had never taken upon themselves to examine into the grounds, nor in the least to question the validity of its decision. Hence they submitted that the sentence, being unimpeached and not reversed, was conclusive, so long as it remained in force, and that of necessity it must be received in evidence in all places, where the subject of that marriage should become a point of litigation; on the whole, therefore, they trusted that it would repel all testimony, and of consequence, make it improper to state any. That there was no ground to impeach the sentence; that it was final and conclusive; the indictment was therefore indefensible; and as no evidence could be received, it would be idle and impertinent to state any.

The counsel for the prosecution, after premising that the argument was of a singular complexion, upon a point perfectly new in experience, not analogous to any known rule of proceeding in similar cases, nor founded on any principle which had been stated, insisted that if the sentence was a definitive and preclusive objection to all enquiry, the prisoner ought to have pleaded it in bar of the indictment; or have relied upon it in evidence, under her plea of not guilty. To say that such a motion was wholly unprecedented, went, as they contended, a great way in conclusion against it. To say that such a rule would be inconsistent with the plea, and repugnant to the record, seemed to them obviously decisive. "After putting herself for trial upon God and your lordships, she beseeches you not to hear her tried. By this mode every species and colour of guilt, within the compass of the indictment, is necessarily admitted; the crime must therefore be taken as proved in its greatest extent, with every base and every hateful aggravation that it can possibly admit; the first marriage solemnly celebrated, perfectly consummated; the second, wickedly accomplished by practising a concerted fraud upon a court of justice, and that in order to obtain a collusive sentence against the first." That the motion was wholly inadmissible; that it was inconsistent with and repugnant to all order, and every mode of trial, to debate on imaginary topics of defence, before the charge was publicly and fully heard; that it was equally so for the court to resolve abstract questions upon hypothetical grounds; and that the sentence was conclusive upon the prisoner, but merely void as against the rest of the world.

admiral court or jurisdiction. This jurisdiction is derived also from the crown of England;—either immediately by commission

The lords ordered that the following questions should be put to the judges, *viz.*

Whether a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage, is conclusive evidence, so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

[. Whether admitting such sentence to be conclusive upon such indictment, the counsel for the crown, may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

The chief justice of the common pleas*, delivered the following, unanimous opinion upon the questions.

MY LORDS,

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause, in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the fact found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases, relative to judgments being given in evidence, in civil suits, these two deductions seem to follow as generally true. First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of concurrent or exclusive jurisdiction, is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding directly, the legality of marriage; and of enforcing, specifically, the rights and obligations, respecting persons depending upon it†; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of

* Sir William de Grey; created lord. Scott in Dalrymple against Dalrymple, published by Dr. Dodson in 1811.

† See the elaborate judgment of Sir Wm.

from the king; or mediately; which is several ways: either by commission from the lord high admiral, whose power and consti-

the proper objects of their jurisdiction. They do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of marriage, or its immediate consequence, "general bastardy;" or in like manner, in some other particular instances, lying peculiarly in the knowledge of their courts; as profession, deprivation, and some others. In these cases, upon the issue so formed, the mode of trying the question, is by reference to the ordinary; whose certificate, when returned, received and entered upon record, in the temporal courts, is a perpetual and conclusive evidence against all the world, upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute of the 9th of Henry 6. requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceedings. But, even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances; as, if a second issue, triable by a jury, is formed upon the same record; or, if the effect of the same issue is put into another form; a jury is to decide, and not the ordinary to certify, the truth; and to this purpose sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality, or fact, was not absolutely, and from its nature, an object *alieni fori*.

There was a time, when the spiritual courts wished that their determinations might, in all cases, be received as authentic in the temporal courts; and in that solemn assembly of the king, the peers, the bishops, and the judges, convened for the purpose of settling the demands of the Church, by Edward the second, one of the claims was expressed in these words: "Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminatum, et transierit in rem iudicatum, nec per appellationem fuerit suspendum; et postmodum, coram iudice seculari, super eadem re, inter easdem personas, questio moveatur, et probetur per testes, vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner: "Quando eadem causa diversis rationibus coram iudicibus ecclesiasticis et secularibus ventilatur, dicunt, quod (non obstante ecclesiastico iudicio) curia regis ipsum tractat negotium, ut sibi expedire videtur." For which lord Coke gives this reason, 2 Inst. 622. "For the spiritual judges' proceedings are for the correction of the spiritual inner man, and *pro salute anime* to injoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done:" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of king James the first.

It is to be observed, that this demand related only to civil suits between the

tion is by the king;—or by the charters granted to particular corporations bordering upon the sea, and by commission from

the parties; and that the sentence should be received as a plea in bar. But this empty and miscarriage, did not prevent the temporal courts from shewing the respect to their proceedings, as they did to those in other courts. And therefore where in civil causes they found the question of marriage, directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as proof of the fact; it being an authority, accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of their courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy, arising incidentally upon a claim to a real estate.

A sentence in a cause of jactitation, has been received upon a title in ejectment, as evidence against a marriage; and in like manner in personal actions immediately founded upon a supposed marriage.

So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted evidence against such contract, in an action brought upon the same promise for damages; it being a direct sentence of a competent court proving the ground of the action.

So a sentence of nullity, is equally evidence, in a personal action, against a defence founded upon a supposed coverture.

But in all these cases, the parties to the suit, or at least the parties against whom evidence was received, were parties to the sentence, and had acquiesced under or claimed under those who were parties and had acquiesced.

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration. First, because the parties are not the same; for the king, in whom the trust of executing public offences is vested, and which is executed by his immediate lessor, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, or to examine witnesses, in any manner to intervene or appeal. Secondly, such doctrines would tend to weaken the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decisions from the course of the common law, to which it solely and exclusively belongs.

The ground of the judicial powers given to ecclesiastical courts, is merely of spiritual consideration, *pro correctione morum, et pro salute animæ*. They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction, is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was always so. A felony by statute, becomes so at the moment of its commission. The temporal courts alone can expound the law; and judge of the facts, and its proofs; in doing so, they must see with their own eyes and try by their own rules, that is, by the common law of the land; it is the trust and duty of their office.

them; or by prescription; which nevertheless, in presumption of law, is derived at first from the crown by charter not now extant (a).

When the acts of Henry the eighth first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriages came within the levitical degrees, and prohibited the spiritual courts from giving or proceeding upon any other construction.

Whilst an ancient statute subsisted (2 H. 4. 15.) by which personal punishment was incurred, on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's courts will examine all things ordained by statute."

When the statute of Will. 3. made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine whether the doctrine complained of, was blasphemous, so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her; or for marrying a child without her father's consent; or for a rape,—where the defence is, that, "the woman is his wife;" in all these cases, the temporal courts are bound to try the prisoner by the rules and course of the common law, and, incidentally, to determine what is heretical and what is blasphemous; and whether it was a marriage within the statute; a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find, that sentences, in the respective cases, had been given in the spiritual court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape; and the court must receive such sentences as conclusive evidence in the first instance, without looking into the case; it would vest the substantial and effective decision, though not the cognizance, of the crimes, in the spiritual court; and leave to the jury and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall, at once, seal up the lips of the witnesses, the jury and the court, and put an entire stop to the proceeding.

(a) The office of admiral, is an office in all the European states that border on the sea, though when it was first introduced into England, is a question. Briton, who wrote in the time of Ed. 1. makes no mention, I believe, either of the court of admiralty, or the office of admiral. The first title of admiral of England, was given by patent of R. 2. to Richard Fitzalan, earl of Arundel and Surrey;—but though the title of admiral be of no very ancient date, yet the office has been of long continuance in this country.

Amongst the Saxons, and since the conquest, particular officers were assigned to guard the seas, by the name of *Custodes*. Rot. Pat. 6 John, m. 8. Rot. Pat. 8 H. 3. p. 1. m. 3. 4. Cl. 9 H. 3. m. 15, &c. Rot. Pat. 48 H. 3. p. 1. m. 3. Thomas de Molton, who was lord Egremont, a great baron of Lincolnshire, was styled *Capitaneus et Custos Maris*—a title of dignity, superior perhaps to that of admiral, and which had been given to lieutenants of England and of Ireland, in the absence of the king. P. 24 Ed. 1.

The admiral jurisdiction is of two kinds, viz. *jurisdictio voluntaria*, which is no other but the power of the lord high admiral,

And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the temporal courts have the sole and entire cognizance of crimes which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that, in all cases, in which sentences, favourable to the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence against him; in what situation must the prisoner be, whose life, or liberty, or property, or fame, rests on the judgments of courts which have no jurisdiction over him in the predicament in which he stands? and in what situation are the judges of the common law, who must condemn, on the word of an ecclesiastical judge, without exercising any judgment of their own?

The spiritual court alone can deprive a clergyman. Felony is a good cause of deprivation. Yet in lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon THAT, and make the conviction a ground of deprivation, neither side can prove or disprove any thing against the verdict; because, as that very learned judge declares, "it would be to determine, though "not capitally, upon a capital crime, and thereby judge of the nature of the "crime and the validity of the proofs; neither of which belongs to them to "do."

If therefore such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath) will direct, or rule, a jury and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming, that every court determines rightly; because it must be presumed too, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly, by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a court COMPETENT to the inquiry then before them; from the same reason, the determinations of two justices of the peace, upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence, (though such sentence against the marriage has not the force of a final decision, that there was none,) yet a cause of jactitation is of a different nature; it is ranked as a cause of DEFAMATION only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether

as the king's general at sea over his fleets; or, *jurisdictio contentiosa*, which is that power of jurisdiction, which the judge of the

it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and "that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage, in another cause: and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence, from going into new proofs to make out that, or any other marriage.

So that admitting the sentence in its full extent and import, it only proves, that it did not YET appear that they were married, and not that they were NOR married at all: and by the rule laid down by lord chief justice Holt, such sentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not THEN sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true. It may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the court was mistaken, it may be shewn that they were misled.

Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Sir Edward Coke says, it avoids all judicial acts, ecclesiastical or temporal.

In *civil suits*, all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In *criminal proceedings*, if an offender be convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself may be traversed by a purchaser, whose conveyance would be affected as it stands; and, even after conviction by verdict, he may traverse the time.

In the proceedings of the *ecclesiastical* court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judgment against it.

In the more modern cases, the question seems to have been, whether the

admiralty has in *foro contentioso*. And what I have to say is of this latter jurisdiction.

The jurisdiction of the admiralty court, as to the matter of it, is confined by the laws of this realm to things *done upon the HIGH SEA only*; as depredations and piracies upon the high sea; offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts, or things made within the bodies of English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea—as charter parties, or contracts made even upon the high sea;—touching things that are not in their own nature maritime, as a bond or contract for the payment of money;—so also of damages in navigable rivers, within the bodies of counties—things done upon the shore at low-water, wreck of the sea, &c.—these things belong not to the admiral's jurisdiction. And thus the common law, and the statutes of 13 Rich. 2. cap. 15. 15 Rich. 2. cap. 3. confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea (*a*).

parties should be admitted to prove collusion, not seeming to doubt that strangers might.

So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, tried by a jury, and determined by the courts of temporal jurisdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts; which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the courts in Westminster-hall.

We are therefore unanimously of opinion;

First, that a sentence in the spiritual court against a marriage, in a suit of nullification of marriage, is *not* conclusive evidence, so as to stop the counsel for the crown, from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion." *

The point being thus decided, the lord high steward directed the attorney-general to proceed in the prosecution; and the fact being afterwards clearly proved, her case was found guilty.

* See the case of Ilderton and Ilderton, *Priestley v. Hughes*, 11 E. R. 1. *Rex v. Brampton*, (Inhab.) 10 E. R. 282. H. Blac. 145. *Rex v. Hodnot*. 1 T. R. 96.

(e) The original jurisdiction of the admiralty is either by the connivance or permission of the common-law courts; the statutes are only in affirmation of the common law, and to prevent the great power which the admiralty

This court is not bottomed or founded upon the authority of the civil law but hath both its power and jurisdiction, by the law and custom of the realm, in such matters as are proper for its cognizance (*a*). And this appears by their process, viz. the arrest of the persons of the defendants, as well as by attachment of their goods; and likewise by those customs and laws maritime, whereby many of their proceedings are directed, and which are not in many things conformable to the rules of the civil law. Such are those ancient laws of Oleron, (*b*) and other customs introduced by the practice of the sea and stile of the court.

Also, the civil law is allowed to be the rule of their proceedings, only so far as the same is not contradicted by the statutes of this kingdom, or by those maritime laws and customs which in some points have obtained in derogation of the civil law. But by the statute 28 Hen. 8. cap. 15. all treasons, murders, felonies, done on the high sea, or in any haven, river, creek, port or place, where the admirals have, or pretend to have jurisdiction, are to be determined by the king's commission, as if the offences were done at land, according to the course of the common law.

And thus much shall serve touching the court of admiralty, and the use of the civil law therein (*c*).

Thirdly, the third court wherein the civil law has its use in this kingdom, is the military court, held before the constable and marshal anciently, as the *judices ordinarii* in this case; or otherwise before the king's commissioners of that jurisdiction, as *judices delegati*.

The matter of their jurisdiction is declared and limited by the statutes of 8 R. 2. cap. 5. and 13 R. 2. cap. 2. And not only by those statutes, but more by the very common law is their jurisdiction declared and limited as follows, viz.

had assumed in consequence of the laws of Oleron. Generally speaking, the court of admiralty has no jurisdiction of matters, or contracts, done or made on land; and the true reason, even for their jurisdiction in matters done at sea, is, because no jury can come from thence; for if the matter arise in any place from whence a Jury can come, the common law will not suffer the subject to be drawn *ad aliud examen*. 12 Rep. 129. Roll. Abr. 531. Owen, 122. Brownl. 27. a Roll. Rep. 413. Vide the case of Ouston v. Hebden, *passim*, 1 Wils. 101. See also Hob.

12. Blac. Com. 3 v. 107. and Fortesc. de Laud. 103. ed. 1775.

(*a*) According to sir Henry Spelman, *Gloss.* 13. and Lambard, *Archeion*, 41. it was first erected by king Edward the third.

(*b*) See chapter 7. Co. Lit. 11. Blac. Com. 3 v. 108.

(*c*) See further as to the jurisdiction of the maritime courts, Blac. Com. 3 v. 68, 69, 70, 106, 107, 108, 109. Hob. 212. 4 Inst. 134. Comb. 462. 13 Rep. 53. 2 Lev. 25. Hardr. 183. 1 Sid. 158. 2 Show, 232. Comb. 474.

First, negatively. They are not to meddle with any thing determinable by the common law. And, therefore, inasmuch as matter of damages, and the quantity and determination thereof, is of that conuzance, the court of constable and marshal cannot, even in such suits as are proper for their conuzance, give damages against the party convicted before them, and at most can only order reparation in point of honour, as *mendacium sibi ipsi imponere* (a). Neither can they, as to the point of reparation in honour, hold plea of any such words or things wherein the party is relievable by the courts of the common law (b).

Secondly, affirmatively. Their jurisdiction extends to matters of arms and matters of war, viz.

First, as to matters of arms, or heraldry, the constable and marshal had conuzance thereof; viz. touching the rights of coat armour, bearings, crests, supporters, pennons, &c. and also touching the rights of place and precedence, in cases where either acts of parliament or the king's patent, he being the fountain of honour, have not already determined it; for in such cases they have no power to alter it. Those things were anciently allowed to the conuzance of the constable and marshal, as having some relation to military affairs; but so restrained, that they were only to determine the right, and give reparation to the party injured in point of honour, but not to repair him in damages (c).

But, secondly, as to matters of war. The constable and marshal had a double power, viz.

1. A ministerial power; as they were two great ordinary officers, anciently, in the king's army; the constable being in effect the king's general; and the marshal was employed in marshalling the king's army, and keeping the list of the officers and soldiers therein; and his certificate was the trial of those whose attendance was requisite (d). Vide Littleton, § 102.

Again, 2, the constable and marshal had also a judicial power,

(a) 1 Roll. Abr. 128. Year-book 57 Hen. 6. 21. Seld. of Duels, s. 10. Fortesc. de Laud. 106. ed. 1775.

(b) Blac. Com. 3 v. 68, 103, 104, 105, 106.

(c) Blac. Com. 3 v. 105.

(d) Fineux Ch. Just. being asked by Hen. 8. what was the power of the Constable, declined to answer; affirming that the jurisdiction did properly belong to the law of arms, and not to

the Common law of England. But though this was an office of immense and dangerous power, a woman might execute it by deputy. Dy. 283. b. There has been no continued high-constable of England, since 12 H. 8. when Edward duke of Buckingham was beheaded. He held it by grand Serjeanty, as heir of the Bohuns. Id. His name was Stafford.

or a court wherein several matters were determinable. As first, appeals of death or murder committed beyond the sea, according to the course of the civil law. Secondly, the right of prisoners taken in war. Thirdly, the offences and miscarriages of soldiers contrary to the laws and rules of the army. For always, preparatory to an actual war, the kings of this realm, by advice of the constable and marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law. We have extant, in the Black Book of the Admiralty and elsewhere, several exemplars, of such military laws; and especially that of the ninth of Richard 2. composed by the king, with the advice of the duke of Lancaster and others.

But touching the business of martial law, these things are to be observed (a), viz.

First, that in truth and reality it is not a law, but something indulged, rather than allowed, as a law. The necessity of government, order, and discipline, in an army, is that only which can give those laws a countenance;—*quod enim necessitas cogit defendi*.

Secondly, this indulged law, was only to extend to members of the army, or, to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others. For others who had not listed under the army, had no colour or reason to be bound by military constitutions, applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.

Thirdly, that the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. This is in substance declared by the Petition of Right, 3 Car. 1. whereby such commissions and martial law were repealed, and declared to be contrary to law. And accordingly was that famous case of Edmond earl of Kent, who being taken at Pomfret, 15 Edw. 2. the king and divers lords proceeded to give sentence of death against him, as in a kind of military court, by a summary proceeding; which judgment was afterwards, in 1 Edw. 3. reversed

(a) For a fuller account of our military and maritime statutes, see the 13th

chapter of the first book of Mr. Justice Blackstone's Commentaries.

in parliament. And the reason of that reversal serving to the purpose in hand, I shall here insert it as entered in the record, viz. "*Quod cum quicumq; homo ligeus domini regis pro seditionibus, &c. tempore pacis captus & in quacunq; curia domini regis ductus fuerit de ejusmodi seditionibus & aliis felonis sibi impositis per legem & consuetudine regni arretractari debet & responsionem adduci, et inde per communem legem, antequam fuerit morti adjudicand^o (trieri) &c. Unde cum notorium sit & manifestum quod totum tempus quo impositum fuit eidem comiti propter mala & facinora fecisse, ad tempus in quo captus fuit & in quo morti adjudicatus fuit, fuit tempus pacis maximæ, cum per totum tempus prædictum & cancellaria & aliæ plac. curiæ domini regis aperte fuer. in quibus cuilibet lex fiebatur sicut fieri consuevit, nec idem dominus rex unquam tempore illo cum vexillis explicatis equitabat,*" &c. And accordingly the judgment was reversed: for martial law, which is rather indulged than allowed, and that only in cases of necessity, in time of open war, is not permitted in time of peace, when the ordinary courts of justice are open.

In this military court, court of honour, or court martial, the civil law has been used and allowed in such things as belong to their jurisdiction, as the rule or direction of their proceedings and decisions, so far forth as the same is not controlled by the laws of this kingdom, and those customs and usages which have obtained in England; which even in matters of honour are in some points derogatory to the civil law. But this court has been long disused upon great reasons (E).

(E) It is singular that so little has been written on the martial law of England. Martial law has in general been defined, a temporary excrescence, bred from the intemper of the state, and not as any part of the permanent laws of the kingdom. It is now, however, indisputably authorized by the legislature*. The king is empowered to form and establish articles of war, as well for his own troops as for those of the East India Company. When we consider therefore, in time of war, when this act is calculated to operate with effect, that no less perhaps than a million of subjects are amenable to its coercion; and that the power of the crown to create crimes and annex punishments, (not extending to life or limb,) is not alienably confined to the sovereign himself, but is diffused by delegation to his different officers on service, it cannot but appear strange that greater attention should not have been paid to it. It is true, that the articles of war, enumerate all such crimes as are punishable with DEATH; and in general all such as are cognizable by a court martial, when acting within reach of the civil power. They are also explicit with respect to such misdemeanors as can be tried under the act. So in the course of military law, winding itself in many forms in the same channel

* The annual act to punish mutiny and desertion.

And thus I have given a brief prospect of these courts and matters, wherein the canon and civil law has been in some measure allowed as the rule or direction of proceedings or decisions. But although in these courts and matters, the laws of England, upon the reasons and account before expressed, have admitted the use and rule of the canon and civil law; yet even herein also, the common law of England has retained those *signa superioritatis*, and the preference and superintendence in relation to those courts; namely,

with that of civil and criminal jurisprudence, a court of *EXQUIRY* is frequently appointed, like a grand jury, to search into complaints, and finally to decide, whether the persons complained of are punishable by law. The complaint is not so much against the law itself, as against the proceedings under it.—For instance, by the articles of war, and the oath which is taken by each of the members of a general court martial, the jurisdiction of the members is confined to a single matter and a single prisoner; notwithstanding which they have looked upon the first swearing in of the court, as a sufficient authority to try a variety of offences—many matters and many prisoners; when, in propriety, the court should be sworn *de novo* on the trial of every prosecution. And though the oath to witnesses should be administered in the presence of the whole court, and of the prisoner himself, it has nevertheless been frequently the practice, to examine a valetudinary witness, by *deputation*, as it is called. It is true, his Majesty annulled the proceedings of one court martial, for having appointed six of its members to take the evidence of a valetudinary witness. But still the practice is, I fear, continued. The deputation is employed, although in fact its irregularity is, at any time, sufficient to render the proceedings nugatory. Opinative evidence, is also, too frequently admitted in courts-martial; forgetting that, in such cases, opinion is substituted in lieu of certainty; and the truth, if not radically discarded, at least subjected to the various motives of the deponent.* These are a few among the many improprieties which prevail in courts-martial. In short the proceeding should be reformed altogether.

Dr. Johnson, talking of a court-martial that was sitting upon a very momentous public occasion, expressed much doubt of an enlightened decision; and said that “perhaps there was not a member of it, who in the whole course of his life, had ever spent an hour by himself in balancing probabilities.” Bosw. 4 vol. oct. 12. One must not therefore be surprised, that they should not know that courts-martial are bound by the same rules of evidence as the courts of common law; and that their general proceedings, where not otherwise regulated by act of Parliament, should follow the same course. 1 E. R. 319. n.

A court-martial may revise its sentence, if it be returned for that purpose; but it cannot be returned more than once. See *Adye* on the subject of martial law; and a treatise intituled “Thoughts on Martial Law, and on the Proceedings of “General Courts Martial,” printed for T. Becket in 1779, and Tytler on Military Law. oct. See also the case of *Grant v. Sir Charles Gould*, Hen. Black. 2 v. 69. and *Sutton v. Johnstone*, 1 T. R. 493, 510. 784.

* Lord George Sackville's Trial, 31.

First, as the laws and statutes of the realm have prescribed to those courts their bounds and limits, so the courts of common law have the superintendency over those courts, to keep them within the limits and bounds of their several jurisdictions; and to judge and determine whether they have exceeded those bounds, or not. And in case they do exceed their bounds, the courts at common law issue their prohibitions to restrain them, directed either to the judge or party, or both. And also, in case they exceed their jurisdiction, the officer that executes the sentence, and in some cases the judge that gives it, are punishable in the courts at common law; sometimes at the suit of the king, sometimes at the suit of the party, and sometimes at the suit of both, according to the variety and circumstances of the case (*a*).

Secondly, the common law, and the judges of the courts of common law, have the exposition of such statutes or acts of parliament, as concern either the extent of the jurisdiction of those courts, whether ecclesiastical, maritime, or military, for the matters depending before them. And therefore, if those courts either refuse to allow these acts of parliament; or, expound them in any other sense, than is truly and properly the exposition of them; —the king's great court of the common law, who, next under the king and his parliament, have the exposition of those laws, may prohibit and control them (*b*).

And thus much, touching those courts, wherein the civil and canon laws are allowed as rules and directions under the restrictions above-mentioned. Touching which the sum of the whole is this—

First, that the jurisdiction exercised in those courts is derived from the crown of England, and that the last devolution is to the king, by way of appeal.

Secondly, that although the canon or civil law be respectively allowed as the direction or rule of their proceedings, yet that is not as if either of those laws had any original obligation in England, either as they are the laws of emperors, popes, or general councils, but only by virtue of their admission here; which is evident, for that those canons, or imperial constitutions, which have not been received here, do not bind; and also, for that by several contrary customs and stiles used here, many of those civil and canon laws are controlled and derogated.

(*a*) Blac. Com. 1 v. 84.

(*b*) Blac. Com. 1 v. 84.

Thirdly, that although those laws are admitted in some cases in those courts, yet they are but *leges sub graviore lege*. And the common law of this kingdom has ever obtained and retained the superintendency over them, and those *signa superioritatis* before-mentioned, for the honour of the king and the common law of England (a).

(a) Such laws (says Blackstone,) thus admitted, restrained, altered, new modelled and amended, are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws. Com. 1 v. 84.

CHAP. III.

Concerning the common law of England, its use and excellence, and the reason of its denomination.

COME now to that other branch of our laws, the common municipal law of this kingdom, which has the superintendency of all those other particular laws used in the before-mentioned courts, and is the common rule for the administration of common justice in this great kingdom; of which it has been always tender, and there is great reason for it. For it is not only a very just and excellent law in itself, but it is singularly accommodated to the frame of the English government, and to the disposition of the English nation; and such as by a long experience and use, as it were, incorporated into their very temperament, and in manner become the complexion and constitution of the English commonwealth.

Insomuch that even as in the natural body the due temperament and constitution, does by degrees, work out those accidental diseases which sometimes happen, and do reduce the body to its just state and constitution; so, when at any time through the errors, distempers, or iniquities of men, or times, the peace of the kingdom and right order of government, have received interruption, the common law has wasted and worn out those distempers, and reduced the kingdom to its just state and temperament; as our present and former times can easily witness.

This law is that which asserts, maintains, and, with all imaginable care, provides for the safety of the king's royal person, his crown and dignity; and all his just rights, revenues, powers, prerogatives, and government; as the great foundation (under God) of the peace, happiness, honour, and justice of this kingdom. And this law is also that which declares and asserts the rights, and liberties, and the properties of the subject; and is the just, known, and common rule of justice and right, between man and man, within this kingdom.

And from hence it is, that the wisdom of the kings of England, and their great council, the honourable house of parliament, have

always been jealous and vigilant for the reformation of what has been at any time found defective in it; to remove all such obstacles as might obstruct the free course of it, and to support, countenance and encourage the use of it; as the best, safest, and truest rule of justice in all matters, as well criminal as civil.

I should be too voluminous to give those several instances that occur frequently in the statutes, the parliament rolls, and parliamentary petitions, touching this matter; and shall therefore only instance in some few particulars, in both kinds, viz. criminal and civil. And first, in matters civil.

In the parliament 18 Edw. 1. in a petition in the lords house, touching land, between Hugh Lowther and Adam Edingthorp, the defendant alleges, that if the title should in this manner be proceeded in, he should lose the benefit of his warrant; and also, that the plaintiff, if he hath any right, hath his remedy at common law by assize of mortdancestor; and therefore demands judgment *si de libero tenemento debeat hic sine brevi respondere*. The judgment of the lords in parliament thereupon is entered in these words:

“ Et quia actio de prædicto tenemento petendo & etiam suum recuperare, si quid habere debeat vel possit eidem Adæ per assisam mortis antecessoris competere debet, nec est juri consonum vel hactenus in curia ista usitat’ quod aliquis sine lege communi & brevi de cancellaria de libero tenemento suo respondeat, & maxime in casu ubi breve de cancellaria locum habere potest, dictum est præfato Adæ quod sibi perquirat per breve de cancellaria si sibi viderit expedire.”

Rot. Parl. 13 R. 2. No. 10. Adam Chaucer preferred his petition to the king and lords in parliament against Sir Robert Knolles, to be relieved touching a mortgage which he supposed was satisfied, and to have restitution of his lands. The defendant appeared, and upon the several allegations on both sides the judgment is thus entered, viz.

“ Et apres les raisons & les allegeances de l’un party & de l’autre, y sembles a seigneurs du parlement que le dit petition ne estoit petition du parlement, deins que le mattier en icel comprize *dovait estre* discuss per le commune ley. Et pur ceo agard suit que le dit Robert iroit eut sans jour & que le dit Adam ne prendroit rien per say suit icy, eins que il sueroit per le commune ley si il luy sembloit ceo faire.” Where we may

note, the words are "*dovuit estre*," and not "*poet estre discussse per le*," &c.

Rot. Parl. 50 Edw. 3. No. 43 (a). A judgment being given against the bishop of Norwich, for the archdeaconry of Norwich, in the common bench, the bishop petitioned the lords in parliament, that the record might be brought into that house, and be reversed for error. "*Et quoy a luy estoit finalement respondu per common assent des ils les justices que si error y fust si ascun a fine force per le ley de Angleterre tiel error fuit voire en parlement immediatement per voy de error ains en bank le roy, & en nul part ailleurs, mais si le case avenoit, que error fust fait en bank le roy adonque ceo serra amendes en parlement.*"

And let any man but look over the rolls of parliament, and the bundles of petitions in parliament, of the times of Edward I. Edward II. Edward III. Henry IV. Henry V. and Henry VI. he will find hundreds of answers of petitions in parliament, concerning matters determinable at common law, endorsed with answers to this, or the like effect.—"*Sues vous a le commune ley;—sequatur ad communem legem;—perquirat breve in cancellaria si sibi viderit expedire; ne est petition du parlement;—mandetur ista petitio in cancellarium, vel cancellario, vel justiciariis de banco, vel thesaurario, & baronibus de scaccario.*"—and the like.

And these were not barely upon the *bene placita* of the lords, but were *de jure*, as appears by those former judgments given in the lords house in parliament. And the reason is evident. First, because if such a course of extraordinary proceedings, should be had before the lords, in the first instance, the party would lose the benefit of his appeal by writ of error, according as the law allows. And that is the reason, why even in a writ of error, or petition of error, upon a judgment in any inferior court, it cannot go *per saltum* into parliament, till it has passed the court of king's bench, for that the first appeal is thither. Secondly, because the subject would by that means lose his trial *per pares*, and consequently his attain, in case of a mistake in point of issue or damages; to both which he is entitled by law.

And although, some petitions of this nature, have been determined in that manner, yet it has been (generally) when the exception has not been started, or at least not insisted upon. And one judgment in parliament, "that cases of that nature ought to be

(a) 50 Ed. 3. No. 38. 4 Inst. 22. Cott. Rec.

"determined according to the courts of the common law," is of greater weight than many cases to the contrary, wherein the question was not stirred; yea, even though it should be stirred, and the contrary affirmed upon a debate of the question: because greater weight is to be laid upon the judgment of any court, when it is *exclusive* of its jurisdiction, than upon a judgment of the same court in affirmance of it.

Now as to matters criminal, whether capital or not, they are determinable by the common law, and not otherwise. And in affirmance of that law were the statutes of Magna Charta cap. 29. 5 Edw. 3. cap. 9. 25 Edw. 3. cap. 4. 29 Edw. 3. cap. 3. 27 Edw. 3. cap. 17. 38 Edw. 3. cap. 9. and 40 Edw. 3. cap. 3; the effect of which is, that no man shall be put out of his lands or tenements, or be imprisoned by any suggestion, unless it be by indictment or presentment of lawful men, or by process at common law.

And by the statute of 1 Hen. 4. cap. 14. it is enacted, that no appeals be sued in parliament at any time to come. This extends to all accusations by particular persons; and that not only of treason or felony, but of other crimes and misdemeanours. It is true, the petition upon which that act was drawn up, begins with appeals of felony and treason; but the close thereof, as also the king's answer, refers as well to misdemeanours, as matters capital. And because this record will give a great light to this whole business, I will here set down the petition and the answer verbatim. Vide Rot. Parl. 1 Hen. 4. No. 14.

"Item, Supplyont les commens que desore en avant nul ap-
 "pele de traison ne de autre felony quelconq; soit accept ou
 "receive en le parlement ains en vous autres courts de dan vostre
 "realm dementiers que en vous dits courts purra estre terminer
 "come ad ote fait & use ancienement en temps de vous noble
 "progeniteurs; et que chescun person qui en temps a venir serra
 "accuse ou impeach en vostre parlement ou en ascuns des vos
 "dits courts per les seignors & commens di vostre realm ou per
 "ascun person & defence ou response a son accusation ou em-
 "peachment & sur son response reasonable record jugement &
 "tryal come de ancienement temps ad estre fait & use per les
 "bones leges de vostre realm, nient obstant que les dits empeach-
 "ments ou accusations soient faits per les seigneurs ou commens
 "de vostre relme come que de novel en temps de Ric. nagdarius
 "roy ad estre fait & use a contrar, a tres grand mischief & tres
 "grand maleveys exemple de vostre realm."

" Le roy voet que de cy en avant toutes les appeles de choses
 " faits deins le relme soient tryez & terminez per les bones leys faits
 " en temps de tres noble progeniteurs de nostre dit seigneur le
 " roy, et que tous les appeles de choses faits hors du realm, soient
 " trïez & terminez devant le constable & marshal de Angleterre,
 " & que nul appelle soit fait en parlement desore en ascun temps
 " a venir."

This is the petition and answer. The statute, as drawn up hereupon, is general, and runs thus: " Item, pur plusieurs grands
 " inconveniences & mischiefs que plusieurs fait ont advenus per
 " colour des plusieurs appeles faits deins le realm avant ces heurs
 " ordain est & establuz, que desore en avant tous appeles de choses
 " faits deins le realm soient tries & terminees per les bones leys de
 " le realm faits & uses en temps de tres noble progeniteurs de dit
 " nostre seigneur le roy; et que ils les appeles de choses faits hors
 " du realm soient tries & terminees devant le constable & marshal
 " par les temps esteant; et ouster accordes est & assentus que nulls
 " appeles soient desore faits ou pursues en parlement en nul temps
 " avenir" (a).

Where we may observe, that though the petition expresses only treason and felony, yet the act is general, against ALL appeals in parliament. And many times the purview of an act, is larger than the preamble, or the petition; and so it is here: for the body of the act prohibits all appeals in parliament, and there was reason for it. For the mischief, viz. appeals in parliament, in the time of king Richard 2. as in the petition is set forth, were not only of treason and felony, but of misdemeanours also. As appears by that great proceeding, 11 Ric. 2. against divers, by the lords appellants; consequently it was necessary to have the remedy as large as the mischief. And I do not remember that after this statute, there were any appeals in parliament, either for matters capital or criminal, at the suit of any particular person or persons.

It is true, impeachments by the house of commons, sent up to the house of lords, were frequent, as well after as before this statute; and that justly, and with good reason. For that neither the act, nor the petition, ever intended to restrain them, but only to regulate them; viz. that the parties might be admitted to

(a) Vide stat. 1 Hen. 4. cap. 14. in the quarto edit. of stat. at large by Run. ed. 1786. lv. 397. Cott. Rec. p. 397.— See also 3 Inst. 31. 122. 1 Mod. 142. Rast. Ent. 49, 50.

their defence to them. And as neither the words of the act, nor the practice of after-times, extended to restrain such impeachments as were made by the house of commons, so neither do those impeachments and appeals agree in their nature or reason. For appeals, were nothing else but accusations, either of capital or criminal misdemeanours, made in the lords house, by particular persons; but an impeachment is made by the body of the house of commons, which is equivalent to an indictment *pro corpore regni*, and therefore is of another nature than an accusation or appeal. Only herein they agree, viz. impeachments in cases CAPITAL, against peers of the realm, have been ever tried and determined in the lords house; but impeachments against a commoner, have not been usual in the house of lords, unless preparatory to a bill, or to direct an indictment in the courts below (a). But impeachments at the prosecution of the house of commons for MISDEMEANOURS, as well against a commoner, as any other, have usually received their determinations and final judgment in the house of lords; whereof there have been numerous precedents in all times, both before and since the said act (b).

And thus much in general, touching the great regard that parliaments and the kingdom have had, and that most justly, to the common law; and the great care they have had to preserve and maintain it, as the common interest and birthright of the king and kingdom.

I shall now add some few words touching the styles and appellations of the common law, and the reasons of it. It is called sometimes, by way of eminence, *lex terra*, as in the statute of *Magna Charta*, cap. 29; where certainly, the common law, is at least principally intended by those words, *aut per legem terra*; as appears by the exposition thereof in several subsequent statutes; and particularly in the statute 28 Edw. 3. cap. 3. which is but an exposition and declaration of that statute (c). Sometimes it is called *lex Angliæ*, as in the statute of Merton, cap. 9. "*Nolumus leges Angliæ mutari* (d), &c." Sometimes it is called *lex & consuetudo regni*; as in all commissions of *oyer* and *terminer*, and in the statutes of 18 Edw. 1. cap. . and *De Quo Warranto*, and divers others. But most commonly it is called the common law;

(a) Cott. Rec. 4. 6. 7. Seld. Judica. 45. 46. 85.

(b) See note at the end of this chapter (A).

(c) See the case of *Burdett v. Abbot*, *passim*, 14 East. 1. and 4 Taunt. 401.

(d) Seld. Dissert. ad Fletam. 3 Inst. 208. Barring on Stat. 44.

or, the common law of England; as in the statute of *Articuli super Chartas*, cap. 15. in the statute 25 Edw. 3. cap. 5. and infinite more records and statutes.

Now, the reason why it is called the common law, or what was the occasion that first gave that determination to it, is variously assigned, viz.

First, some have thought it to be so called, by way of contradistinction, to those other laws, that have obtained within this kingdom. As, first, by way of contradistinction to the statute law. Thus a writ of entry, *ad Communem Legem*, is so called, in contradistinction to writs of entry, *in Casu consimili*, and *Casu proviso*, which are given by act of parliament. Secondly, by way of contradistinction to particular customary laws. Thus, descents at common law, dower at common law, are, in contradistinction to such dowers, and descents, as are directed by particular customs. And thirdly, in contradistinction to the civil, canon, martial, and military laws, which are, in some particular cases and courts, admitted as the rule of their proceedings.

Secondly, some have conceived, that the reason of this appellation was this, viz. In the beginning of the reign of Edward III. before the Conquest, commonly called Edward the Confessor, there were several laws, and of several natures, which obtained in several parts of this kingdom, viz. THE MERCIAN LAWS—in the counties of Gloucester, Worcester, Hereford, Warwick, Oxon, Chester, Salop, and Stafford: THE DANISH LAWS—in the counties of York, Derby, Nottingham, Leicester, Lincoln, Northampton, Bedford, Bucks, Hertford, Essex, Middlesex, Norfolk, Suffolk, Cambridge, and Huntingdon: THE WEST-SAXON LAWS—in the counties of Kent, Sussex, Surrey, Berks, Southampton, Wilts, Somerset, Dorset, and Devon (*a*).

(*a*) Cornwall is not in the above list. The inhabitants of that country, were such as fled thither, in the sixth century, from the rage of the Saxons—who had then conquered all parts of Britain, called England; except Wales and Cornwall—countries mountainous and barren, encompassed almost by the sea, and by land difficult of access.—The old laws of the Saxons make particular mention of the Danish, the Mercian, and the West Saxon laws. And notwithstanding Sir Matthew Hale is supported by the authority of

Camden, Spelman, Cowell, Selden, Du Fresne, Phillips, and Tyrrell, yet bishop Nicholson (*Eng. Hist. lib.* 1. 113. *Scotch Hist. pref.* 29) strongly contends that such a division of the English laws is imaginary. The bishop has taken great pains to define the genuine import of the word *laga*; and will have it, that *laga* (in composition with *Dæna*, *Mýrcæna*, and *Węst Sæxena*, in any of our Saxon remains) signifies properly a country, a district or a province, and that it cannot be otherwise rightly translated. Giving all due

This king, to reduce the kingdom as well under one law then was under one monarchical government, extracted out those provincial laws, one law to be observed through the kingdom. Thus Ranulphus Cestrensis, cited by sir Henry man in his Glossary, under the title *Lex*, says, *Ex tribus his bus Sanctus Edvardus unam Legem—&c.* And the same, *in verbis*, is affirmed in his history of the last year of the same Edward. (*Vide ibid. plura de hoc.*) But Hoveden carries 1 common laws, or those styled the Confessor's laws, much further in his History of Henry II. he tells us, *Quod istæ Leges inventæ & constitutæ erant tempore Edgari, avi sui, &c.* Hoveden. And possibly the grandfather might be the first collector of them into a body, and afterwards Edward might be the composition, and give it the denomination of the common law. But the original of it cannot in truth be referred to Edward but is much more ancient, and is as undiscoverable, as the source of Nile (a). Of which more at large in the following chapter.

Thirdly, others say, and that most truly, that it is called common law, because it is the common municipal law, or common justice, in this kingdom. So that *Lex Communis*, or, *Jus commune*, is all one and the same with, *Lex Patriæ*, or, *Jus Patriæ*. For although there are divers particular laws, some by custom applied to particular places, and some to particular causes, that law, which is common to the generality of all persons, and all causes, and has a superintendency over those particular laws that are admitted in relation to particular places, or matters, is called *Lex Communis Angliæ*; as the municipal laws of other countries may be, and are sometimes called, the common law of that country; as *Lex Communis Norræ*, *Lex Communis Burgundiæ*, *Lex Communis Lombardicæ*, &c. So that, although all the

credit to the learning, to the industry and ingenuity of the bishop, it is certain that all our historians and antiquaries, (himself alone excepted,) are agreed that there was a threefold division of laws, out of which and other laws then extant, the Confessor made that collection which is called by his name, and which made one common law; and that the proper definition of law is *lex*, law. Blackstone has followed this generally received opinion. Com. 1 v. 65. Though these laws were somewhat different from each other, yet it must be admitted, that the

difference, for centuries, chiefly consisted in the various rates of mulcts which were exacted from the guilty of certain crimes, as to the plenty or scarcity of money in their respective countries. I held (says Spelman) "an unchangeable in substance, differing rather in quantity of amercements, than in the course of justice." Reliquiæ 49. But see the pref. 21. to Fleta. ed. 1775 oct.

(a) See Hallam's View, 2 v. p. 190.

reasons have their share in this appellation, yet the principal cause thereof seems to be the latter. And hence some of the ancients called it, *Lex Communis*; others, *Lex Patriæ*; and so they were called in their confirmation by king William I. whereof hereafter (a).

(a) See Dr. Taylor's Elements of the Civil Law—a book of infinite learning, and from which the student may derive considerable information. Though Mr. Gibbon (speaking of that work) says it is “a work of amusing, though va-

rious reading; but which cannot be praised for philosophical precision.” Gib. Hist. 8 v. oct. 66.—And in another place, (id. 77) he terms the author —“a learned, rambling, spirited writer.”

[Note (A) referred to in p. 52.]

AS to parliamentary impeachment, the great guardian of the purity of our constitution, the student may consult that most excellent and useful publication, “the Parliamentary History of England;” Montesq. Sp. L. xi. 6. 1. Hal. H. P. C. 150. Rot. Parl. 4 Ed. 3. n. 2. and 6. 2 Brad. Hist. 190. Seld. Judic. in Parl. c. 1. Blac. Com. 1 v. 269. 4 v. 259. 399. and 12 & 13 W. 3. c. 2.

An important question, relative to the nature and continuance of parliamentary impeachment, took place in the year 1790. Mr. Hastings having been impeached, for high crimes and misdemeanours, the Parliament, pending his trial, (which had engrossed two or three years,) was dissolved. Within a short time after the meeting of the new Parliament, namely on the 17th of December 1790, it was moved in the House of Commons, “That it appears that an impeachment by this House, in the name of the Commons of Great Britain, against Warren Hastings, esq. late governor-general of Bengal, for sundry high crimes and misdemeanours, is now depending.”—The honourable member, (Mr. Burke) who moved it, stated that an impeachment was not to be defeated by collusion with a minister, or by the power of the Crown; and that it abated by a dissolution of Parliament, was not to be found, in plain, express terms, on the journals, either of the House of Lords, or Commons, nor in the minutes of conferences between the two Houses.

The House of Lords, it had been said, was a supreme court of judicature, and was therefore the sole judge of its own proceedings. But had the Commons no control over the House of Lords in their judicial capacity? The House of Commons had no judicial, no executive function; but, as the seeming paradoxes in our constitution would appear, on examination, to be founded in the deepest wisdom, from this apparent want of function in the Commons, from this seeming want of power, it had all power. It was the watch, the inquisitor, the purifier of every judicial and executive function; and from its apparent impotence, derived its greatest strength. Were the Lords to resolve, in their judicial capacity, that a writ of error abates by prorogation or dissolution of Parliament, would the House of Commons hesitate to interfere, (as they had done in the case of Skinner and the East-India Company,) when the Lords attempted to usurp original jurisdiction?

AGAINST the motion it was urged, that a committee should be appointed to

search for precedents; by which course alone, the House could decide with dignity and precision. But before recourse was had to precedents, a great preliminary question presented itself:—namely, by what rule, and upon what principles, the subject was to be investigated; whether it was a question of privilege, to be decided by expediency, or a question of law, to be determined by rule?

It was objected, that it appeared to be judicial. That the present state of the impeachment, was a pure question of law; to be decided by the House of Lords, sitting as a court of impeachment, on the inquisition of the Commons. Arbitrary and anomalous proceedings, by which the subject was questioned before jurisdictions not legally defined, and exposed to trials and to judgments, ascertained by no legal standard, were the great vice of the ancient Government of England; the grievance which first called forth the spirit and wisdom of the founders of our constitution. To bring the enjoyment of life, property, and liberty, within the plain protection of positive law, was the object of *Magna Charta*; which enacted, that no man should be taken, imprisoned, or deprived of property, privilege, or franchise, but by the judgment of his equals, or the law of the land*. Under such an alternative, therefore, every English trial must be had; a jury of equals must decide in all cases, on the life, or person of an English commoner; unless there were exceptions by immemorial custom, or positive statute; or, in other words, by the law of the land.

The trial by impeachment was one of those exceptions; and the course of proceeding under it, could never be affected by a resolution of the House of Commons—but must be changed by the united act of the whole legislature.

Established by the most ancient usage†, it was unquestionably an institution, necessary for the preservation even of the law itself, and all the securities of the government; was instituted by the same cautious wisdom, tempered with the same benevolent spirit, which so peculiarly characterised English jurisprudence. In times, when the power of the Crown and its subordinate, executive magistrates, would, without due check, have laid waste all the rights of the subject; when even the judges, were but too often the subordinate engines of oppression, it became necessary to provide a tribunal, where criminals could be questioned, whose authority or influence might over-awe or seduce the ordinary course of justice. But the founders of our constitution, did not forget the safety of the criminal, even when providing for the superior safety of the state. When they conferred an inquisitorial jurisdiction, on one branch of the legislature, they recollected the overruling influence of such an accuser, and therefore conferred the power of judicature, upon a coequal branch of the government.

By this mode of considering the subject, it could alone be reconciled with *Magna Charta*; for though the party impeached was not, in all cases, tried, by his equals, yet he was still tried by the law of the land, (the alternative, of the statute,) which he could not be, if an impeachment was not a branch of the established, criminal justice of the country.

Besides this legal proceeding by impeachment, before the Peers of the realm, as a court of criminal judicature, it would appear, from the ancient records of

* C. 29

† The first instance of an impeachment, is said to have been lord Latimer, in the 50th of Edward III.; and the second that of the

earl of Suffolk, in the 10th of Rich. II. When fully established, see Hallam's View, 2 v. ch. 8.

Parliament, (many of which had been collected by Lord Hale, in a manuscript printed by Mr. Hargrave, but not published,) that the Lords anciently called Commoners before them, on the accusation of individuals, contrary to *Magna Charta* and the various confirmatory statutes. Repeated complaints were made of those abuses; at length they were declared to be void, and were formally abolished by statute*. The Lords however, for some time, seemed to have disregarded the statute, till upon a private impeachment of Lord Clarendon, by Lord Bristol, the House of Lords referred the question to the Judges; who declared such a proceeding, on the accusation of an individual, to be contrary to the 29th chapter of *Magna Charta*: *Nec super eum ibimus, nec super eum ponemus*†. From that time an impeachment by the Commons, was the only case in which a commoner could be subjected, by law, to the judicature of the Peers. Assuming then, impeachment to be a legal prosecution, could it be a question, by which of the two Houses, every matter which the accused had a direct interest in, should be adjudged?

That the jurisdiction of deciding on the existence or state of an impeachment, as it might be affected by the dissolution of Parliament, was a question equally judicial, with any other which might occur, in the course of trial. Nay, the Lords might be obliged to decide it, on the objection of the person accused.

If the decision was with the Lords, it was next to be examined, by what rule it ought to be decided. If the rules of decision were not to be found in their journals, where were they to be sought for, and what rule of law, for protection of the subject, could exist? Hence the solution of the question, (let it be discussed where it might,) depended wholly on the judgment of the Lords, in similar instances, to be collected from their different acts, as found in the journals of their own House.

The idea of taking up an old proceeding, *in statu quo*, as it has been called, was attempted to be refuted by a description of the powers of the Commons, and the limits to which they were confined. If a day was given for attendance, and the day arrived in a new Parliament, the next House of Commons could not act upon it. If the Commons imprisoned for a contempt, the door of their prison was opened, when those who imprisoned were no more. If the Commons had framed a bill, and their messenger was carrying it up to the Lords, when the King dissolved the Parliament—no future House could proceed upon that stage of the bill, but the whole was to be resumed. In impeachments, the Commons had a peculiar character, as accusers—though they had no judgment, either to acquit or to condemn, nor any direction, as to the mode of proceeding, or the extent of judicial powers in the court, at whose bar they appeared; yet they had a judgment of disabling, at any period, by their own discretion, all farther steps in that court, and could make it wait for their *fiat*, whether the justice which they had invoked, should, or should not, be carried into effect. The House of Lords also, in its judicial character, could not imprison for a minute, beyond that which closed the Parliament‡. There was one dilemma however very difficult, if not impossible, to be solved, namely, if the Lords could not imprison at all, or bail for a time beyond the Parliament, upon impeachment for high crimes, and might yet

* 1 Hen. 4. c. 14. ante, page 51.

† *Mittimus* in orig.

‡ But see Perry's case, who was impri-

soned for a fixed time, for publishing a libel. Debates and Ann. Reg. 4798. and *Roe v. Flower*, 8 E. R. 314.

proceed, *in statu quo*, at a new Parliament, the power was a mockery of justice, for they had no prisoner. If they could, on the other hand, imprison him till the next Parliament, they could have done it indefinitely, as long as it pleased the King, to discontinue Parliament. In writs of error the record remains, and so in impeachments; but in writs of error there is no evidence. Was it meant by the term "*depending*," that the record was in court, so that Mr. Hastings might be called again to plead, or that the evidence was to go on where it left off?

As to precedents, the first important fact was, that from the time impeachments began, down to the year 1678, not one instance was to be found of an impeachment, continued by the next Parliament.—Probably some of the earlier impeachments were closed, within the Parliament which first adopted them; but it should be recollected how very short the continuance of Parliament used to be, in those times. Instances however, before 1678, occur, (within the reigns of Charles the First, and Charles the Second,) where impeachments, in *fact*, were at an end, if not in law, after the Parliament was dissolved, before judgment. Two cases had existed, in which it should seem, as if the Lords and Commons had supposed the impeachment legally at an end, on the dissolution of Parliament.

One was the case of the Duke of Buckingham, in the second year of Charles the First, when that minion became the just object of popular indignation. The Commons impeached him; pending his impeachment, the King dissolved the Parliament, evidently for the purpose of defeating the prosecution. In the mean time, the King extracted the articles of impeachment, converted them into an information against the Duke in the Star Chamber, and stopped that proceeding, under the colour of being satisfied by the evidence, that he was innocent.—This was notice to the Commons, that the King looked upon the impeachment, after dissolution, as a nullity. The next Parliament was convened in a short time after the manœuvre; but no more was heard of the impeachment.

In 1665 another instance occurred; the case of Drake, who was impeached for a libel. The Lords directed, that in case of a dissolution, he should be the object of prosecution by the *Attorney-General* in the King's Bench.—The order for prosecuting by the *Attorney-General* after a dissolution, was illegal; but the suspicion which gave birth to it, appeared to have been, that he would else have escaped, and that neither imprisonment, nor bail, would have been legal, between that Parliament and the next. Though, prior to these periods, instances were to be found of proceedings in Parliament against criminals of state, (not in the form of impeachments,) extended in fact from one Parliament into the next; yet as far as those obsolete precedents went, this at least appeared: 1st. That special orders were deemed necessary, to continue the charge; which necessity admitted that, without special orders, it would have abated; and, 2dly. That unless it appeared the charge was acted upon, *in statu quo*, after evidence heard, it would not reach the object of the resolution under debate: namely, the power to go on against Mr Hastings, just where the Managers had left off.—At the critical period of 1678, the Lords and Commons were united, and equally violent against the popish plot, or against the minister, who was then disgraced. Lord Shaftesbury and the malecontents of the day, had forced themselves upon the cabinet, and governed that very committee, whose chairman was Lord Essex. These

being the actors and the views, the act was in character. It would speak for itself. It was full of trick—it shunned the light—and made a new law, without reason, precedent, or analogy. The Lords were first reminded of the impeachments. What course did they take? They referred to their committee an enquiry upon two points, which were distinct; one, respecting the continuance or abatement of appeals and writs of error,—without apparent occasion for it; another, respecting the particular state of the impeachments, which had been made in the former Parliament. The report made on the following day was, that from their view of a judgment by the Lords in 1673, petitions of appeal, and writs of error were in force, to be acted upon. They add, (as appeared by Sir Thomas Raymond's report*), that the papers contained in that judgment of 1673 were too voluminous. In a distinct sentence, after stating the impeachments to be upon special matter assigned, they gave their opinion on a point of law, to which they had not been interrogated, and at once affirmed, that all those impeachments were, *in statu quo*; not in reference to the judgment of 1673, nor upon any ground, either stated or insinuated. Both parts of the report were then adopted by the House, who, it did not appear, had ever looked at the judgment in 1673, but gave implicit credit to the committee for a candid statement of its effects upon writs of error. Who would have entertained a doubt, upon the report, that in 1673, the Lords had affirmed that writs of error were to continue, after a dissolution? But when the judgment, as it was called, (which was only a resolution of the Lords, on reference to their committee), was brought forward, it appeared that no question was put respecting *dissolution* of Parliament, with reference to writs of error; the only question being, Whether if *prorogation* had intervened, those writs were at an end? If it should be urged, that "*prorogation* was the same as *dissolution* of Parliament in principle," that proposition would be refuted, as well as denied to be law, under the authority of Lord Hale, who died after 1673, and before 1678†. In his manuscript, that great man alludes to the resolution of 1673, as correcting and reversing the law of a former judgment, (made by the Lords in his hearing, and in that same Parliament), that even upon *prorogation* writs of error abated. But was Lord Hale of opinion, that *prorogation* and a *dissolution* of Parliament were the same as to writs of error? So far from it, after seeming to adopt the decision of 1673 as good law, he proceeds to affirm as a point clear of doubt, that after a *dissolution* of Parliament, the writ of error and petition of appeal, was at an end; adding, that he had himself known it so ruled. In truth, there was no fair analogy, between writs of error and impeachments, after a dissolution of Parliament; one containing mere points of law, upon record, the other containing an accusation of facts. In character with such law, so made, was the course of impeachment against Lord Stafford. The trial of Lord Stafford was of importance, in marking what shame was felt upon the judgment in 1678, and in what manner the examination of it was eluded. Jones, Maynard, and Winnington say, "The Lords have passed a judgment. It is too clear to be disputed. We are to suppose they had good reason for it; we are to suppose they had precedents; but if they had none, it is proper to make one;" that is, by taking away Lord Stafford's life. The Earl of Danby, in 1682, accused the Peers of blowing upon their own order, by refusing a bill which would have enacted it into a law. Then came the reversal in 1685 of that resolution; so

* T. Raym. 383.

† Namely, 25th December 1676.

that, authority against authority, the last prevails, and it was therefore the law of the court, that impeachments abated after a dissolution of Parliament. As to the period of 1685, the first year of a short and wicked reign, it deserved all the odium which a more enlightened age had thrown upon it.

But it was not true that the Commons were then completely enslaved. Serjeant Maynard was a host in favour of liberty, and then a Member of Parliament. He had been a champion for the order of 1678 against Lord Stafford; but in 1685, though in the habit of protesting against many encroachments, he urged nothing against the order of reversal, which negatived the continuance of impeachments after a dissolution. In 1690, the times were excellent, and perhaps a better æra for the liberty of the subject, could not be found. Maynard was in the House of Commons and Somers, Solicitor-General. A question was directly put by the Lords, Whether impeachments continued, or abated, upon a dissolution? All the old precedents were examined, and not concealed as in 1678. The Committee *intimated* their sense of the law to be, that impeachments were at an end, upon a view of those precedents; and on that view, the question of discharging the Peers was expressly put.

In 1717, the Earl of Oxford, by a resolution of the Lords, was subjected to an impeachment, after *prorogation*; and it was not possible to read the dissenting Lords in their Protest, without concluding that the point had been conceded, namely, that a dissolution of Parliament terminated an impeachment.

It was admitted, that there was no precedent to be found previous to 1678, of an *impeachment* having survived a dissolution; and as to the precedents which were collected by the Committee in 1673, none of those related to impeachments by the Commons; all of them, which were criminal proceedings, and not mere writs of error, were criminal appeals, directly contrary to *Magna Charta* and the ancient statutes; persisted in, even after the statute 1st of Henry the Fourth, chapter the 14th; and finally declared by the Lords, on reference to the Judges, to be contrary to law, in Lord Bristol's charge against Lord Clarendon. And even in those cases, the Lords had given a day to the parties, in the succeeding Parliament; which, in the present instance, they had omitted, even if they had the power to have given one; by which, there was an incurable chasm in the proceedings. The party was, without day, in court, and his bail finally discharged from their recognizances; which went only to have him before that Parliament. Mr. Hastings therefore was not bound to appear, nor had the Lords any process to enforce his appearance;—at all events none to continue the proceedings, which were discontinued, by no day having been given.*

That the order of 1678, was not established upon any antecedent custom of Parliament, but stood on a strained analogy to writs of error; which, never did continue from Parliament to Parliament, till the existence of that order;—as appeared from the authority of Lord Hale and Lord Coke, and a decision of all the Judges *temp.* Charles I.

That order however was reversed in 1685, in the following terms;—

“Resolved, that the order of the 12th of March 1678-9 shall be reversed and “annulled as to impeachments.”

Therefore while the order of 1685 remained, the matter was not debatable;

* Hawk Pl. Cr. tit. *Discontinuance*.

and the Lords, (let the Commons vote what they might,) could not, with propriety, refuse the benefit of it to any man standing before them in judgment. The question, therefore, was Whether the order of 1685 was in force?

The Lords Salisbury and Peterborough, were impeached of high treason in 1689. Parliament was dissolved in the beginning of 1689, and a new one met in the same year. In 1690, those Lords petitioned to be discharged, stating the dissolution of parliament, and also a free and general pardon. The operation of the pardon was referred to the judges. On their answer, the question being put for their discharge from imprisonment, it passed in the negative; and being then admitted to bail, they remained subject to the impeachment, till they were discharged wholly upon the search of precedents, and on the order of 1685. After the answer of the Judges, the matter of pardon was never again discussed; but the Lords assembled on the general question of the continuance of impeachments; a Committee having been previously appointed to search the precedents on the subject. It appeared, by the Lords Journals of the 30th of March 1690, that the Committee on that day reported, "that they had examined the Journals of the House, from their beginning in the 12th of Henry VII. and all the precedents of impeachments since that time, which were in a list in the hands of the clerk, and also all the precedents brought by Mr. Petyt from the Tower, among all which, none were found to continue from one Parliament to another, except the Lords who were lately so long in the Tower;"—alluding to the Popish Lords, who were kept there under the order of 1678, and afterwards discharged under the order of 1685, which annulled it. Upon this report, and not on the pardon, those Lords were discharged.

The impeachment was put an end to; the prisoners discharged, without consent, message, or communication with the Commons; and by a direct affirmance of the order of 1685, made on the face of the Lords Journals: yet no resolution was come to in the Commons, nor any objection taken to the proceeding; though this happened when the Commons were in high strength, and in the very day-spring of the Revolution.

Sir Adam Blair, Mole, Gray, and Elliott, who had been impeached about the same time, after continuing on bail till the discharge of Lords Salisbury and Peterborough, were also liberated, without any communication with the Commons.

The Duke of Leeds's case in 1701, which followed next in order, (and which would, no doubt, be relied on, in favour of the continuance) it was said, made quite the other way. After the articles had been brought up, and towards the close of the same Parliament, the Lords, by message, reminded the Commons of their impeachment, and told them the session was drawing to its close. Soon after the Parliament was dissolved. On the meeting of the new parliament, the Lords, without any message to the Commons, dismissed the articles; entering on their Journals only, that in the *former Parliament*, the Duke of Leeds had been impeached, articles brought up, and answer put in; but that, the Commons, *not prosecuting*, he was discharged. That the failure of prosecution applied to the expired Parliament; for if the impeachment had continued to the new one, a message should have been sent, before the articles were dismissed for want of prosecution, according to a privilege always insisted on by the Commons, namely, that the Lords, on an impeachment, can take no step but in their presence. The

discharge was therefore, because the jurisdiction of the Lords was at an end, and not an act of judicature on a subsisting impeachment; for the Commons never made any complaint, as they did, when Lord Somers was acquitted in their absence.

The cases of Lord Somers, Oxford, and Halifax, where the entries were similar to that of the Duke of Leeds, were open to the same observation. As to the last and only remaining precedent, that of the Earl of Oxford, in 1717, that established, what effect a dissolution was *then* supposed to have on an impeachment; for it had then been doubted, much more denied, that a dissolution would destroy an impeachment, it was extravagant to believe that Lord Oxford could have been advised, to petition to be discharged on the intervention of a prorogation only, even if a dissolution had been taken to be ineffectual; still more improbable that the Lords would have seriously entertained it, and searched for precedents on the subject.

Reference was now made to the case in Carthew,* where Lord Holt was supposed to have decided that impeachments were not abated by dissolution. That case, it was urged, was an application by Lord Salisbury to the King's Bench to be bailed before the Parliament met; and he was properly told by the King's Bench, that being impeached of treason, he was not within the Habeas Corpus act, and therefore not being *de jure* bailable, the rest was, of course, matter of discretion. The Court, indeed, took notice, that *commitments* of the Lords continued, notwithstanding a dissolution of the Parliament. But the case which would probably be relied on for that doctrine, was Lord Stafford's, which was while the order in 1678 remained in force; besides, the House of Lords, which alone had jurisdiction to decide upon the existence of the articles, made the decision, on the meeting of Parliament, in the very instance of Lord Salisbury; and without a murmur from the Commons, finally discharged that very impeachment which had been the subject of Salisbury's application to Chief Justice Holt. That Holt's opinion, on a collateral point, and where the King's Bench had no jurisdiction, could never be opposed to the judgment of the House of Lords, which alone had jurisdiction, and which had decided the very point, in the very instance, for which that opinion might be cited. The argument, therefore, might be rested on the principles set out with; the judgments of the Court competent to decide, and an acquiescing Legislature; nay, what was stronger than both, acquiescing accusers: for, (without relying on the admission, that no impeachments before 1678 appeared to have been continued from Parliament to Parliament, the case of the Duke of Buckingham, in the time of Charles the First, shewed the sense of the Commons themselves on the subject. They had impeached the Duke, who had become universally odious; apprehending the loss of their proceedings by dissolution, they sent a remonstrance to the King on the subject; but the Parliament was dissolved. The new one met, equally revengeful against Buckingham; yet instead of going on with the impeachment, they addressed the King to remove him from his councils; but the impeachment was never mentioned again, not even in debate. Sir Edward Coke sat in that Parliament, who had been removed from his seat in the King's Bench, by Buckingham, and who had also made him Sheriff, to prevent his return to Parliament; yet it never occurred to that great

* Carth. 132.

lawyer, with all his resentments about him, to consider the prosecution as existing—Leaving therefore the question of *abatement* at rest, a much greater question presented itself, which the resolution, though its meaning was avowed; did not distinctly express; viz. Whether, supposing the articles themselves did still remain of record, untouched by the dissolution, *the proceedings upon them*, existed in *statu quo*?

But in order to decide upon both questions, the principles of English criminal law, and the rules in criminal trial, in other cases, should not only be considered, but applied, as far as precedent and sound analogy would support the application. An impeachment continuing, as was proposed and insisted on, violated them all.—

The first security was, that persons accused should be brought to a speedy, or rather an immediate trial, to avoid long imprisonment, and the anxious miseries of a doubtful condition. This was provided for by the Habeas Corpus act.

That if some limitation had not applied to an impeachment, by its being a proceeding confined to a Parliament, it appeared strange that the provisions of that second *Magna Charta*, had not been extended to that case; or at least some convenient limitation enacted, consistent with that species of proceeding; for, if impeachments might continue beyond one Parliament, they might continue for life, and operate to perpetual imprisonment. The liberty of the subject, would then no longer depend on the law, but on the will of one branch of the Legislature.

The next great security was, that the persons appointed to try, were to be purged from all prejudice, by the challenges of the prisoner. It was true, that the constitution of the Court, where the Judges sat by inheritance or creation of the Crown, to a certain degree ousted that great privilege; and in one Parliament, or in the course of trials in general, its operation, in so large and respectable a body could not be very dangerous. But if it could continue from Parliament to Parliament, without limitation, the party impeached, might come at last to be judged by strangers to his impeachment, nay, what was worse, even by his very accusers; who, coming up from the other house by succession or creation, would judge upon property and life, on their own accusation; yet without the possibility of challenge from the accused.

The last great rule of English trial was, that the trial, once begun, should continue, without alteration or separation, to prevent impressions from any source, but the evidence; that the evidence should be given by the witnesses in presence of the prosecutor, the prisoner, and the Court; and that the verdict should be given on the recent view and recollection of it. Here again, the frame and constitution of the Court of Impeachment, to a certain extent, deprived the subject of those valuable privileges. But still, considering it as a trial in *one Parliament*, the evil, though to be lamented, had its limits. The prosecutors were the same; the court nearly so; the evidence, might, during adjournment, or even prorogation, be, with the aid of notes, recollected. But what was the case when Parliament was dissolved? It could not be said, that the pendency of an impeachment, deprived the people of the free choice of their representatives; not one Member, therefore, of the former Parliament might return, by election, to the new one. How, then, was such new House of Commons to proceed?

Suppose the former Parliament to have been dissolved, just when the accused had made his defence, and that while the evidence on which his accusation

rested was fresh in his own memory, and present to the recollection of the Managers and the Lords, he had rested his whole defence on observations on that evidence, without calling witnesses; appealing to the honour of the Managers for the truth of them, as well as to the justice of the House;—suppose, when he had thus finished, and had impressed even the Commons themselves with his innocence, the Parliament had been dissolved; how could such a trial proceed *in statu quo*? Were the new Commons to reply to the prisoner, whose defence they had never heard? or was the prisoner to make it over again, when the foundation of it was forgotten, in order that the new Commons might hear it? And supposing he could do it, it would still be observations on evidence which the Managers had never seen, and of which there was no record; and which, even if recorded, would be written evidence, contrary to the genius of the English law. Suppose even an interval of years to exist, which might often happen, between the giving of the evidence by the witnesses in one parliament, and the hour of deliberation and judgment in the next; and in a case, too, where a judgment of guilt or innocence might absolutely depend upon the most accurate recollection of the evidence; in what situation would the Lords and Commons stand upon such an occasion? The Lords who had sat from the beginning of the trial, must judge wholly from the injudicial notes of a clerk, and with but feeble recollection of the oral testimony; and the new Lords, open to no challenge, could judge from no other possible source, never having even seen the witnesses who delivered it. In the same manner must the Commons demand judgment against a person, whom the old Commons, who had heard the evidence, might have acquitted.

That there was a great difference between writs of error, appeals, and an impeachment. Writs of error and appeals being regulated by the laws and customs of the realm, modified by the usage of Parliament: but an impeachment was governed by the law of Parliament only. That, upon a dissolution, an impeachment should abate, as the person impeached was put without day, which consequently entitled him to his discharge: and the House had no power to revive the impeachment, since it was an acknowledged principle, inherent in the constitution, that the Parliament should die, and all its proceedings determine with its existence.

That the Commons of England gave up their privileges, in giving up the point of abatement, since one of the most essential privileges of the people was security and protection against indefinite trial, the protracted and tedious trial to which the doctrine of non-abatement led. It could not be imagined that the last House of Commons could bind the present by any one of its resolutions—if it had the right so to do, it must also have the means—It could not; nor could a blade of grass, the property of any gentleman of landed property, nor the smallest coin, the property of any monied man, be touched by any resolution of that House; then how could a resolution of the House hold a subject, bound to answer from year to year? Precedents, when militating against justice, were to be received with jealousy. If the precedents even were absurd, yet if they had constituted a rule of law, and that rule was established and understood, it was of more consequence the rule should be acted upon, than that that impeachment should be continued upon any abstract, theoretic principle.

In support of the motion, it was confidently said, that after having examined, with all possible accuracy, such precedents as were analogous, each of them went,

decidedly in favour of the impeachment, remaining *in statu quo*. The growth and development of the principle of impeachment, was traced from the reign of Edward IV.—for the purpose of shewing that in its relation to the effect of a dissolution, it was precisely the same, for impeachments, as for writs of error and appeal. Various instances were produced of writs of error not abating prior to 1673; hence it was concluded, that the report of the Committee, and the resolutions of the Lords at that time, which had remained unquestioned ever since, were founded not only on precedents, but on what was clearly understood to be the law and practice of Parliament. That the report and resolution of 1678, respecting the continuance of an impeachment after a dissolution, were grounded upon that of 1673; because both impeachments and writs of error, stood so strictly connected in principle, that it was impossible to make a distinction between them. That the resolution of 1673 could not have been adopted, merely as a colourable foundation, for the resolution of 1678, because when the former passed, it was impossible that the case to which the latter applied, could have been foreseen; and when the Earl of Danby applied to the Court of King's Bench to be bailed after the dissolution of Parliament, the Court recognized the doctrine, that the impeachment did not fall to the ground in consequence of the dissolution, as the known and established law of Parliament. On the precedent of 1685, by which the resolution, as far as it respected impeachments, was reversed, it was remarked, that its authority was of no avail, the Commons having been corruptly chosen and wholly devoted to the Court;—the principal evidence of the prosecution, Titus Oates, convicted of perjury, and consequently incompetent; and the resolution itself passed without any examination of precedents, not generally with express limitation to the particular case. Hence it was inferred, that from the cases of the Lords Salisbury and Peterborough, 1690, it was understood to be the law of Parliament, that impeachments do not abate by a dissolution; and after much delay and management, they were at last discharged by a resolution strictly applicable to their particular case, and in no respect affecting the general question. Even the case of the Earl of Oxford, in the year 1717, would, as far as it proceeded, warrant a similar conclusion. The question was no less, than whether the right of the Commons to impeach should exist?

That a right, admitted and acquiesced in for centuries, was not to be supposed doubtful, because some ingenious men had endeavoured to bring into question, what their ancestors had agreed in for three hundred years; and if forced analogies and sceptical arguments, from vague and unsupported theories, were to be the grounds of appointing Committees of Enquiry into the privileges of the Commons, there was no right however established, but might be called in question, no privilege, however necessary, but might be disputed. Not a line in the Journals of the Commons could justify a doubt; and if doubts were to be raised by investigation of the Lords Journals, no Member of that House would look into those Journals, for the privileges of the Commons. They alone were competent to declare their own privileges; and there was an end of the power of impeachment itself, if they were to inquire of the Lords, what were its limits, and calmly submit that important privilege to their determination. In this view of the subject, it was idle to search for precedents, because the principle was a matter of daily practice; for three years the House had gone on with the trial, from session to session, from prorogation to prorogation; and that in principle and in law, there

was no difference between dissolution and prorogation, between a new session and a new Parliament. It had been admitted that the course of decisions of a competent court were sufficient to form, though it could never be admitted, that any decision of the House of Lords could make the law. Their decisions, consistent with principle, were the best evidence of law, which the House however could not make by its resolutions. That very principle however proved the impeachment did not abate; for no course of decisions, not even one authority, could be produced for its abating, but that of 1685, which was to be raked from the ashes in which it had lain ever since it had passed, despised and forgotten by the very men who made it; contaminated by the circumstances which gave it birth, and the times in which it happened.—That the question had been attempted to be reasoned, upon principle, upon analogy, and upon authority. Among other analogies, bills of attainder and other legislative proceedings had been alluded to, which unquestionably were abated by dissolution. But if there was any analogy between the two cases, the objection to the argument was, that it proved too much. Unfortunately, bills of attainder, like other legislative proceedings, ended with a session, and were destroyed by prorogation, equally as by a dissolution. Where had the analogy lain for four years? Had the friends of Mr. Hastings been so negligent as not to remark the similarity between impeachments and bills of attainder, till then? Or if they had remarked it, why did they not come forward with the analogy three years ago, convey the knowledge to the House, and inform the House, that it was prosecuting Mr. Hastings without authority, because impeachments were like bills of attainder, and ended, as they did, with the session of parliament in which they commenced? That it never had been doubted within those walls, that an impeachment continued from Parliament to Parliament. In truth, it could hardly be said with fairness, that it had ever been doubted, any where. Before the question was agitated with any party view, in the case of the Popish Lords, the great Lord Nottingham, a man eminently learned, to whom the profession of the law owed as much as to any man; who had done more to form and improve one branch of our law, than all who had succeeded him;—that great Judge, in declaring the causes of holding the Parliament, and speaking for the Crown itself, had solemnly and deliberately been of opinion, that a dissolution made no alteration on an impeachment. Upon the meeting of Parliament in the year after the Popish Lords were impeached, addressing himself to the Commons, he informed them, that the King had, during the dissolution of Parliament, been applied to, to liberate those Lords; but that he had thought it right to reserve them for justice, and desired the Commons to proceed speedily with the trials, that they might not suffer the miseries of indefinite confinement. Before he had directed the Commons to proceed upon the trials, he must have been of opinion that the trials were in existence. When the question came afterwards in the next session to be agitated, it was solemnly settled by the resolution of 1678, that the state of impeachments was not affected by dissolution of Parliament; not upon the spur of the occasion, but upon mature deliberation; upon following up the principle which was established in the year 1673, and which had never since been controverted. Much abuse had been thrown on the times of 1678. But let those times be what they might, the resolution in question, was not tainted by them. It had nothing to do with the Popish plot. The question was agitated on the impeachment of Lord Danby; for crimes distinct from the plot, and decided

by a House of Lords, not particularly inimical to that Minister. After that period, the question was again mentioned in the House of Commons. In one of the conferences with regard to Lord Danby, the Managers, among other things, reported, that one of the Lords had put the Commons in mind, that they had gained two great points in that Parliament, viz. that impeachments continued from Parliament to Parliament, and that the impeached Lord must withdraw. The Managers for the Commons replied, that those points were agreeable to the ancient law and rule of Parliament. Upon that law, Lord Stafford was tried and executed; and in his case, it was solemnly decided. Much had been said with regard to that trial, namely, that the witnesses were perjured, and that that unfortunate nobleman had a hard fate. But if the witnesses were believed, the conviction was just. About the period when those things passed in Parliament, the question had more than once occurred in Westminster Hall, where it was equally admitted as law, that impeachments continued, notwithstanding a dissolution. Lord Danby and the Popish Lords, had applied to be bailed; if an idea had prevailed of the abatement of the impeachment, their application ought to have been, for their *discharge*. But the Court would not even bail them, till Jeffreys was made Chief Justice. Bailing was an affirmation of the commitment, and therefore a direct authority, that the impeachment subsisted. Upon looking into the case of Fitzharris, there was ground to say, that the question had been solemnly determined by all the Judges. Fitzharris had been generally impeached by the Commons of high treason; no articles were presented against him. Parliament was dissolved. He was afterwards indicted for a special treason, under an act of Charles the Second; he pleaded, that he was impeached. In the course of the discussion of that plea, his Counsel often endeavoured to argue, that impeachments continued, from Parliament to Parliament. Had the law been clearly otherwise, it would have been easy to have told them, "What signifies this argument? The impeachment is gone." So far from it, the Chief Justice studiously avoided that question; and when they were pressing to argue it, stopped them by saying, that the only question before the Court upon the plea was, Whether a general impeachment for treason, could be pleaded in bar of an indictment for the particular treason set forth? In the course of the trial, one of the Counsel for Fitzharris, insisted, that it had been, after the dissolution of Parliament, solemnly resolved by all the Judges, that the King could not proceed upon the indictments against the Popish Lords, on account of the impeachments, which were *then depending* against them. The answer made by the then Attorney-General was, that that was an extra-judicial opinion.—Though the opinion was extra-judicial, still it had all the weight of an opinion of the twelve Judges; an opinion which they could not have formed, if they had not thought impeachments did not abate, and that a dissolution of Parliament had no effect upon the state of an impeachment.

After all this, it might have been thought the point was clear; but in the first day, of the first Parliament, of James the Second, in the moment of servility and adulation, the House of Lords thought proper to reverse the order of 1678, so far as related to impeachments, and next day to discharge the Popish Lords. If ever there was a time dangerous to the liberties of this country, it was that period. A weak and bigoted Prince upon the throne; a packed and garbled House of Commons, almost named by the Crown, in consequence of the violent

and arbitrary destruction of the charters of the different corporations; a people broken-hearted, almost worn down in their repeated struggles with the Crown; added to all which, had the House of Commons been differently formed from what it was, to proceed with the prosecution was impossible. The principal witnesses were convicted of perjury; yet in such a time, and under such circumstances, even the *then* House of Peers, was ashamed to declare the resolution of 1678 not to be law. On the very day, in which that minister of wickedness, Jeffreys, took his seat as a Peer, it was reversed; without putting any declaration in its place; without enquiry, without examination, without the knowledge of the Commons, and without daring to look in the face, the very resolution, which was attempted to be reversed; the Protest expressly stating, that it was *not* *allowed to be read, though repeatedly called for*. Yet such a precedent, at such a time, and under such circumstances, was now gravely contended to be sufficient, to overturn settled law, to destroy every principle, and trample upon the privileges of the Commons. But had even that case been regarded and followed? The very man who made, deserted it. It had served his purpose, and was laid aside for ever. Not many years afterwards, in 1688-9, Lords Salisbury and Peterborough were impeached. After the dissolution they applied to the King's Bench to be bailed. Holt was then Chief Justice, a man of as great and respectable character, as ever sat upon the bench, but certainly not remarkable, for any great respect for the privileges of Parliament. He was the friend, and had been the Counsel of Lord Danby. In his case, he had opportunity to consider the nature of impeachments; that very question must therefore have been before him, and he could not be ignorant of the resolution of 1685, which had liberated his client. Yet neither the Lords applying to be bailed, nor the Court in refusing to bail them, take the least notice of that order. Upon the authority of the case of Lord Stafford, (which certainly was not law, if the order of 1685 was supposed to have had any operation,) the Chief Justice and all the Judges refused to bail them; expressly grounding their judgment, on what had been determined at that trial, as having settled the law upon the point. Had either the Lords themselves, or the Judges, an idea that the resolution of 1685 had altered the law, would the one have totally forgotten in their application to the court, and the other totally neglected in their judgment, a solemn determination, made only a few years before, and within the positive knowledge of both the parties and the Judges? Upon the meeting of Parliament, those Lords applied to the House of Peers, who appointed a committee to search precedents, and attempted to involve their case, with that general question. An act of *general pardon* had passed. A question was put to the Judges, whether their case was within it. The Judges were of opinion, that if the offences were committed under certain circumstances, they were; and on a subsequent day they were discharged. But had the precedent been followed? The same person who had been impeached as Earl of Danby, was in 1695, impeached as Duke of Leeds; he was under impeachment for five years, and through several Parliaments. How did it happen that he never claimed the benefit of the resolution of 1685? After five years, and three dissolutions, the House of Lords took up his case, but did not declare that it had long been at an end. They acted upon it as a *pending* proceeding, and dismissed it, "*the Commons NOT PROSECUTING*;" which was a direct authority in the present case. About the same period, (in the year 1701,) Lord Holt had again

occasion to consider the law of impeachments, in deciding the case of Peters and Benning,* in which he declared, THAT *impeachments upon which some proceedings had been had, and Parliament dissolved, might be CONTINUED in a subsequent Parliament.* Mr. Justice Foster expressly states the case of Lord Salisbury, as grounded on the act of general pardon; and reasons from it in a manner which it was impossible he should have done, if he had been of opinion that his impeachment had been ended by a dissolution. To all these authorities, parliamentary and legal, nothing was opposed, but the proceedings in 1685. An attempt had been made, to argue something from the Protest, in the case of Lord Oxford, in the year 1717, urging that it must have been admitted in the debate, that dissolution would abate an impeachment. No such admission could be gathered from that Protest. It had been asserted by the Minority, who, from their own assertion, argued, that a prorogation would equally abate it. That Protest stated, as fact, a matter notoriously untrue, namely, that dissolution and prorogation equally put an end to judicial, as to legislative, proceedings. Every one knew that judicial proceedings in the House of Lords, abate neither, by the one nor the other.

It had been said, that writs of error and all other judicial proceedings, till the year 1673; abated by a dissolution. At that very time it was equally held, that prorogation abated a writ of error; how then came it that impeachments continued from session to session? If the fact were true, it would prove that impeachments did not in former times abate, when writs of error did; or were it admitted that the analogy was well founded, it would prove that when it came to be held that writs of error did not abate by dissolution, it ought equally to have been held, as to impeachments. But the position, that writs of error and appeals, in ancient times, abated, by a dissolution, was not well founded. The order of 1673; was not the result of the arbitrary will of the House of Lords, but the consequence of an investigation into what was the ancient course of proceeding in that House: and whoever would look at the cases quoted in the Report, preceding the order of 1673, or would examine the numerous cases to be found in Lord Hale's book, or the rolls of Parliament, would find that the ancient course was to present a petition, complaining of an erroneous judgment; in consequence of which, a *scire facias* issued, returnable at the next Parliament. So far was the proceeding from abating, that in ordinary course, the party was not compelled to appear and hear the error, till the next Parliament; which principle was not confined to proceedings in error alone, but extended to every judicial proceeding before the House of Lords; as was evident from the Report in 1673. That there was a case, (17th Charles II.) † where it was expressly declared, that writs of error, and *scire facias* thereon, did not abate by prorogation. About the middle of the reign of James the First, a practice began, which became more frequent in the time of Charles the Second, of making writs of error returnable immediately, and making orders in the House of Lords, for their hearing, from time to time. It was then argued, that as those writs, and the appearance of the parties, were supported by orders of the House, and as all orders expired with a dissolution or prorogation, that writs of error were at an end. In consequence of this reasoning, the Courts of Law held the writ to be abated; but so far

* 12 Mod. 604.

† Prichard's case, 1 Lev. 165. 1 Sid. 245. Raym. 120. 1 Keb. 887.

were they from making any distinction between dissolution and prorogation, that all the cases which held those proceedings abated by dissolution, were grounded on the case of Gonsalve and Heydon, which was the case of a dissolution. So far those cases were an authority, to prove that there was no distinction between prorogation and dissolution, as to *judicial* proceedings. When the House of Lords found the courts below, proceeding in this course, they were compelled to investigate the subject; the consequence was, the order of 1673; which order, it was true, extended only to prorogation; but the principle extended equally to dissolution, and was accordingly applied to that case, in the year 1678. Those orders again brought the law back to its ancient principle, and *judicial* proceedings in Parliament have ever since, as they had done in ancient times, continued undisturbed by a dissolution. The court in which they are, continues the same; the time of its meeting is fixed to a certain day, by prorogation; to an uncertain one, by a dissolution; but the court, the judges, all the proceedings, remain untouched, unaltered. There was no distinction, in law, between dissolution and prorogation. Lord Coke expressly says, that every new session, is a new Parliament; and in that has been followed, without contradiction or dispute, by every lawyer who has succeeded him. So far, therefore, as analogy to other *judicial* proceedings in the House of Lords could apply, that analogy was in favour of the motion. Calling a parliament, conferred no authority; dissolving it, took away none; the rights and powers of the peerage existed, independent of the Crown and its powers, and when called into action, naturally returned to their former state. It was nothing more, than appointing a time for the high court of Peers to meet, without having the least operation upon its proceedings.

Still however it was difficult to believe that to be law, which appeared so destructive to the vital power of the House of Commons. Impeachments were of no use, if they might be stopped at the pleasure of the accused. They were naturally directed against men in power. Could it be doubted, that he who had so advised the Crown to misuse its authority, as to deserve an impeachment, would hesitate in advising a dissolution to save himself? Would he, who had risked every thing in the commission of one crime, doubt about the commission of another, to secure himself from the consequences of his former guilt? There was no period of an impeachment, in which it might not be done. The criminal might take the chance of an acquittal, and finding that likely to fail, save himself by this mode. It was said he might be impeached again. The doctrine however, went to throw open his prison-doors and to elude justice. Was it a thing unknown in the History of England, for a Minister to fly from the vengeance of Parliament? Was it nothing, that the means of escape, were in his power? But suppose he did not fly, did he not return to the new Parliament, with the same weapon in his hand, to defeat and elude the justice of his country?

The rights and privileges of Parliament were concerned, which must ever remain inviolably sacred, or the Constitution be destroyed. Precedents had been consulted with laborious industry; but those adduced in favour of impeachments *abating*, on a dissolution of Parliament, were in number so few, and of such questionable authority, that no one would say they ought to be relied on, in preference to the *fundamental principles* of the Constitution. But, there existed no evidence of such a uniform rule of parliamentary practice. The case of the

Duke of Suffolk, in the reign of Henry the Sixth, indisputably proved that impeachments continued *in statu quo*, from one Parliament to another. By the resolution of the Lords in 1673, writs of error and petitions of appeal, were made to continue from Parliament to Parliament; but it had been contended, since no mention was made of *impeachments* in that resolution, that a dissolution of Parliament operated as an *abatement* of such proceedings. The very opposite conclusion was deducible from the Report of the Committee; which expressly stated, that *writs of error, petitions of appeal, and other business of a JUDICIAL nature*, ought to extend, from Parliament to Parliament. Impeachments, therefore, as judicial proceedings, did not necessarily *abate* by dissolution. In the order of 1678, *impeachments* were expressly mentioned, in common with writs of error and petitions of appeal, to continue from one Parliament to another. To that precedent, however clear and decisive, objections had been taken to invalidate its authority. First, it was affirmed to have been a *precipitate* proceeding. Did it refer to any new matter, not included in the former resolution of 1673? Clearly not. It was only a deduction from the principles already laid down in the former decision; and could not therefore be *precipitate*. But the critical juncture of affairs, during the ferment, of party violence and civil contention, might probably, it was said, contribute materially to that resolution, which authorised the continuance of impeachments. That objection, too, must vanish, the moment the circumstances of the times, when the decision in question took place, were contrasted with those of the subsequent period, when it was rescinded. In 1678, the proceedings of the Lords were not influenced, by any particular reference to any matter then depending; it was a general order, that writs of error, petitions of appeal, and impeachments, should survive a dissolution of parliament. Nor was that, the production of party violence; it was an unanimous decision, founded on the resolution of 1673, to serve as a standing precedent for the conduct of future impeachments. But what was the case of the reversal of that decision in 1685, so much depended on, as a precedent, in favour of the abatement of impeachment, by dissolution? Was *that* not at the era, when James the Second, a bigoted and Popish Prince, had ascended the Throne; when the Parliament was *obsequiously* devoted to the monarch; when the sacrifice of principle was required to be made, by the prejudices of the times; when certain Popish Lords were about to be solemnly impeached, who were the supposed favourites of the King? Under such circumstances, what was the conduct of Parliament? They might think, compliance better than resistance, at such a period; and therefore detained, probably with the best intentions, to rid themselves of the impeachments in contemplation, by rescinding the order of 1678. The professed object therefore of that reversal, was, to screen the accused, from the impending danger of impeachment. Against which of the decisions did the objection taken from the circumstance of the times, apply most forcibly; to the order of 1678, or to its reversal in 1685? Unquestionably to the latter.—The next objection to the order of 1678 was taken from the case of Lord Stafford. How could that invalidate the authority of that precedent? It afforded indeed an opportunity of appealing to the passions;—but was that a legitimate argument?

The case of the Lords Salisbury and Peterborough, adduced as a precedent in favour of an *abatement* of impeachment, by dissolution, was equally unfortunate;

for there did not appear from the proceedings, any reference, either to the order of 1685, or to any former decision on the subject. And as to the impeachment of Lord Danby, there could not exist a doubt as to the sentiments then entertained by Parliament. He was dismissed, because the Commons had *declined* the prosecution. Three dissolutions of Parliament had interposed, before he was discharged. It was evident, if a dissolution operated as an abatement; Lord Danby would have been dismissed on the first dissolution; nay, he would, upon that principle, have been discharged of course. But the case was otherwise. Parliament was repeatedly dissolved, and Lord Danby as often detained; at length, the Commons declining to prosecute, he was discharged; so that his impeachment *abated* by the act of the Commons, not by the operation of a dissolution. In the cases of Lord Somers, Halifax, Portland, and the Duke of Leeds, the impeachments abated in the same manner. The Commons not prosecuting, the parties were discharged.

Parliament, it was urged, exercised two powers, legislative and judicial, each of which had separate and distinct limits and duration. The confusion of those powers, was the principal source of all the doubts upon the present question. Lawyers had differed as much in their opinions respecting writs of error, and petitions of appeal, as of impeachments; and from such a collision of *opposite* sentiments, much satisfaction could not be expected. Reference should therefore be made to the clear, established principle of the Constitution. Every act of legislation terminated by prorogation, as well as by dissolution; but no judicial act was influenced by either. Impeachment therefore being a judicial proceeding, could not be affected either by prorogation or dissolution.

That the authority of Lord Hale should be distrusted, since writs of error, petitions of appeal, and impeachments, were considered by him as *legislative* proceedings. All legislative proceedings, unquestionably abated by prorogation, as well as dissolution; but impeachments, writs of error, and petitions of appeal, were *judicial* proceedings, which continue from session to session, from Parliament to Parliament. The error of Hale proceeded from his confounding legislative with judicial power, in parliamentary proceedings. Lord Holt entertained a different opinion on the subject, since he had argued from the case of Lord Stafford, as a weighty and irrefragable precedent, in favour of the continuance of impeachments, and other judicial proceedings, from one Parliament to another. Lord Chief Baron Comyns, an authority of the highest respectability, was also decided in his opinion on the subject; for, from a passage in his Digest,* it appeared, not only that impeachments continued, but that they could be resumed and prosecuted, until judgment was obtained, notwithstanding any interruption, either from prorogation or dissolution. Writs of error, petitions of appeal, as judicial acts, survived prorogation and dissolution; why not impeachments? To admit the continuance of the former, and insist on abatement of the latter, by the operation of dissolution, was absurd; since, as judicial proceedings, they were branches of the same power, and their connexion depended on a permanent union with the same principle.

Though the House of Lords was perpetually changing its Members, yet supposing the new Members ignorant of the proceedings already had on an impeachment, what inconvenience could arise from that, when the whole evidence

* 5 V. oct. 219, 250.

was printed? The judgment was formed upon printed evidence; notes were in constant practice, and written evidence consulted;—without which it were impossible, in cases of impeachment, to reduce, under one view, the whole mass of evidence. There were few instances in which impeachments did not occupy some days; written evidence was therefore as indispensable in a trial of ten days, as of three years.

And not only the Court was accessible to all, but reports and papers, respecting the evidence, were open to inspection. Suppose the party impeached, to have made some progress in his defence, his accusers might possess sufficient influence to procure a sudden dissolution of Parliament; the consequence might be, a fresh accusation, fabricated out of his own defence. An impeachment, therefore, in justice should continue *in statu quo*, after a dissolution: and the House of Lords could not proceed to judgment, unless the House of Commons prayed it.

The former was a permanent judicature. In all impeachments, the accusing party virtually, though not identically, was the same, as well after a dissolution as before; for it were ridiculous to contend, that the great body of the people, in whose name, and on whose behalf, the Articles had been carried up to the House of Lords, had sustained any material alteration. As no real change, then, had happened, either in the tribunal, or in the prosecutor, upon what principles of reason, or of justice, should the chances of escape be multiplied to the guilty, or the tortures of imputed guilt be prolonged to the innocent, because the King might be advised to call a new parliament?

But another consideration, arose out of the case of the Earl of Danby. That Minister had been impeached by the House of Commons in 1678, and, after considerable delays, had pleaded the King's pardon. Charles the Second, told his Parliament, in the most express terms, that he had given Lord Danby a pardon under seal: and if that pardon should be found defective in form, he would renew it, till it should be perfect; for he was determined to protect him, as he was not criminal, (assigning not a very constitutional reason for his innocence), having acted only in obedience to his orders. That was precisely the case which an impeachment was peculiarly calculated to reach. The King could never regularly be answerable for the faults of his government. Ministers alone were responsible; and if they valued their reputation, or their safety, would relinquish their situations, whenever the King should be resolved to act in contempt of their advice:—the boasted right of impeachment, would otherwise be a mockery. If the King, who was not amenable, could effectually take the blame upon himself and protect his minister by a pardon—every species of political infamy, would be placed beyond the vengeance of an insulted nation. The House of Commons, resisted the validity of the plea with firmness; and the King had recourse to his only chance of screening his favourite from justice, by dissolving the Parliament. —That the doctrine contended for by the House of Commons in Lord Danby's case, was afterwards solemnly established by one of the most happy and sacred Acts of the Legislature, namely the 12th and 13th of William the Third*, which had settled the succession to the Crown upon the House of Hanover; and had enacted, for the better securing the rights and liberties of the subject, that no pardon under the great seal *should be pleadable* to an impeachment by the

* C. 2. s. 3.

Commons. But of what use was that salutary clause, if the King, who was restrained from the improper exercise of his prerogative in one mode, might eventually produce the same effect in another—by dissolving the Parliament? It had been well observed, in opening the business, that the House were in a Committee, in one of its great superintending capacities, namely in the Committee of Courts of Justice: and it was the nature of the Court, and the circumstance of the House of Commons itself being the prosecutor, which could produce a doubt. But when the case was stated, it would prove more clearly the necessity of standing upon their own privileges, and only admitting the precedents, (not decisive) of other Courts, and of the House of Lords, as illustrative of the question. They therefore stood upon the soundest precedent in the history of the Constitution, when they determined not to go into a Committee to enquire into precedents, where their privileges were clear and material. It had been agitated in 1679, whether a pardon was pleadable in bar of an impeachment. The Commons, when called upon by the Lords to argue the question at their bar, refused to argue it, because it was so clearly interwoven with the Constitution, and so essential a privilege, that to argue was to doubt; and to doubt, was almost an abandonment of the right.—That the identity of Parliament was gone, and the House sat under a new authority, was denied. The Lords, had been properly stiled the *hereditary Judges* of the kingdom. Why?—Because they derived their jurisdictions from their Patent of Peerage, not from the writ of summons on dissolution, or proclamation to meet in Parliament after prorogation. No act of the King could take it away, no act of the King could therefore abate it. The authority was given with the patent of Peerage; the day or time to exercise it, by the writ of summons, to meet at the beginning of a Parliament; or of the proclamation, to meet at the beginning of a session. Thus the day of meeting appointed by the King, at pleasure, gave the time for exercising the jurisdiction of the Court, styled the Court of the King in Parliament; just as the common law, by giving the Term to the Judges of Westminster Hall, gave the time for exercising their judicial powers. In short, it was a Court perpetually existing. Lord Hale, whose authority had been so much relied on, said in the case of *Sedgwick and Gofton**, in the year 1673, that the Register of writs contains a *scire facias* for a writ of error *ad proximum Parliamentum*. The Lords therefore, when they resolved that judicial matters survived in *statu quo*, from session to session, in 1673, considered session and Parliament, (as it was,) to be one and the same thing; not only on the force of the precedents there cited, but on the reason of the thing, derived from the nature of the jurisdiction; considering it as a Court, which though, like all other Courts, it had certain times of acting, yet, like all other Courts, had a constant existence, and could not be annihilated. Historical anecdote ought to be consulted, in explaining decisions and precedents. Who would abandon history, as a mean of clearing doubtful cases? The character of the Judges who decided, was material in the judgments of Courts of law; so was the character of the times, in Parliamentary precedent. On the precedent in 1673, history was silent; but the silence of history was an important ingredient in that case. Research had been made in vain, into all the histories of the times, for the origin of that important resolution: but what had been looked for in vain in the histories of those times, had been found in the law books.

* 1 Mod. 106.—3 Keb. 256. S. C.

From the Restoration, to the year 1673, it appeared by many of the law reporters, that many cases, respecting the operation of prorogation and dissolution, on writs of error and appeals, had taken place: doubts had arisen, and the Courts knew not how to decide. The resolution of 1673 must therefore have been a rule to settle those doubts; a rule, taking its rise, not out of impeachment, party agitation, or political spirit;—but out of mere questions of private right and private property, uninfluenced by passion or violence. And what did that resolution mark out? That the Court of the King in Parliament, was a constantly existing Court, whose judicial proceedings were not touched by the exertion of prorogation, but remained, *in statu quo*, from session to session, which was the same as from Parliament to Parliament.

The Committee of 1678 referred to the Journal 1673; which states precedents, not only of civil, but, of criminal cases, subsequent to the act of Henry the Fourth. Those antecedent, however, were as good authority to the present point, as those subsequent. The object of the act of Henry the Fourth was to abolish criminal proceedings before the Lords, at the suit of individuals. Till that time they were legal; and from the precedents, they appeared to have endured, from Parliament to Parliament. At that time, if they endured from session to session, they endured from Parliament to Parliament; for it was admitted, that in the early times of Parliament, prorogation was unknown; at least none appeared on record, previous to the reign of Philip and Mary. Those cases therefore, whether prior or subsequent to the time of Henry the Fourth, established, that criminal proceedings begun in one Parliament, were carried on in subsequent Parliaments, and did not abate. But it had been endeavoured to shew, that the Parliament of 1678 deserved no credit! a Parliament which, next to that which settled the Revolution, and that which seated the House of Brunswick on the throne, deserved more of posterity than any Parliament on record. It was not right to consider Parliament by the character of the times, but by constitutional acts, in their legislative and deliberative capacity. In that view, there was not an important or a material privilege of personal freedom, parliamentary independence, or constitutional principle, afterwards enacted and enforced at the Revolution, which was not enforced and carried by the House of Commons in 1678. All the seeds were sown in that Parliament, which afterwards grew to maturity. It passed the *habeas corpus* act;—it resisted Lord Shaftesbury, who, as Chancellor, had attempted to regain the power of trying elections, and judging of the right of Members to their seats; and thus, by a second struggle, fixed that invaluable privilege for ever. It resolved, not on precedent and record, but on the clear, unalienable rights of a free constitution, and the independence of inquisitorial power, (without which inquisitorial power was a mockery)—that a pardon was not pleadable in bar of an impeachment;—that a Lord High Steward, an officer named by the Crown, was not a necessary part of the Court of the King in Parliament; which, if it had been necessary, empowered the Crown to stop an impeachment *in limine*, by refusing to appoint that officer; and lastly, completed the great work of inquisitorial independence, by deciding that a dissolution did not annul an impeachment. The resolution of 1678, therefore, was not only sound and just in itself, but was the act of a Parliament, whose reputation stood as high, for constitutional doctrine, as any in the annals of our history. With regard to the precedent of 1685, if, instead of

having passed in times when a servile House of Lords, and a packed House of Commons, chosen by boroughs deprived of their legal rights, acting under a bigoted misguided Prince, that resolution had passed in the best of times, and under the most perfect Parliament, it would amount to no authority whatever; because, it only removed one resolution, without substituting another in its place; and in so doing, left the principle entire, for it did not venture to affect other judicial proceedings. If so, it was like reversing a rule of court;—(rules which Courts of Judicature were competent to make, either to advance justice or regulate their proceedings);—but which could neither make law, nor annul it.

The cases at common law, confirmatory of the continuance of an impeachment, were again alluded to. First, the case of Lord Danby*. Holt was counsel at the bar. Jeffreys, the Judge, came down, on purpose to do the job of the day; yet he, who was not fettered by any principle of duty, who could foresee all the consequences of admission, admitted that all that was done, was to enlarge Lord Danby's custody; and that upon the meeting of the new Parliament, they might proceed to the trial. So far there was the authority of Jeffreys, (the infamous instrument of prerogative and oppression,) that impeachment endured from Parliament to Parliament. The next case in the books†, arose on the application of Lord Salisbury to be bailed, in 1690. Lord Holt, counsel for the prisoner in the former case, was now Chief Justice of the King's Bench, and presided at that application. He, who knew exactly all that had passed, said, that commitments by the Peers, endured from Parliament to Parliament; that Lord Danby being bailed to appear at the next session of Parliament, was an affirmance of the commitment, and a plain proof of the opinion of the Court at the time, that the commitment was not avoided, or discharged, either by prorogation, or dissolution. In 12th Modern, 604, Lord Holt says, (by way of illustration); "If an impeachment be in one Parliament, and some proceeding thereon, and then the Parliament is dissolved, and a new one called, there may be a continuance on the impeachment." Holt, who was counsel for the Popish Lords in 1679, had twice, as Chief Justice, delivered that doctrine; and was, perhaps, of all the Judges who ever sat in Westminster Hall, the Judge whose authority was of most importance in a point of Parliamentary privilege; he who had been led to a full consideration of the privileges of both Houses, and had opposed, as a Judge in Westminster Hall, the privileges of each‡. So that if any cases deserved authority, those deserved authority, as being delivered by a Judge, who had more means of information on the particular case, than any person of those times; who was not afraid of combating the privileges of either House; whose authority therefore, on such a question, might be deservedly reckoned higher than that of any Judge who had ever sat in Westminster Hall; because if he had prejudices, they were prejudices unfavourable to the privileges of Parliament, when set in opposition to the Courts of Westminster Hall.

It had been argued, that the present House of Commons must be supposed totally ignorant, of the whole which had passed, and therefore incapable of going on with the prosecution. A great constitutional principle, however, was

* Skin. 56. 162.

† Carth. 131.

‡ The King v. Knollys, 1 Ld. Raym. 10.

Ashby and White, 2 Ld. Raym. 938,
6 Mod. 45. and see Burdett v. Colman.
13 East.

not to be decided by extreme and abstract cases, but by the solid principles of reason and law; applied to the conduct of men, to the principles of the constitution, and the existing state of things. The whole was a question of expediency. The necessity of ending the impeachment did not arise from dissolution; because the new House of Commons, being still the legal organ of the people, who never die, could as well express their sense in the new, as in the former Parliament, and in a new Parliament, many of the same persons were returned, who knew the facts, who had conducted the business, and therefore could decide upon the expediency of the proceeding.

But, conceding that prorogation did not annul an impeachment, had decided the question; for there was no distinction, in the opinion of lawyers, or in the thing itself, between prorogation and dissolution. Whether Parliament were considered according to its personal, deliberative, legislative, or judicial functions, dissolution and prorogation were the same. If either House of Parliament, in its deliberate capacity, was engaged in any investigation, dissolution put an end to the proceeding; so did prorogation. If a legislative act was in progress; dissolution put an end to it; so did prorogation. So personal privilege was put an end to by dissolution, as well as by prorogation. But as to judicial proceedings, it was the reverse;—they continued. A writ of error was, confessedly, not ended by prorogation; neither by dissolution. Why? Because prorogation and dissolution were the same in law. An appeal was not ended either by prorogation or dissolution. And the question now was, Whether an impeachment, that great act of inquisitorial power, which controls Ministers and Judges, and protects the constitution,—in its nature judicial,—in its proceeding, analogous to the trial of a Peer, in a Court which never ceases to exist, (though its time of acting might be interrupted at the will of the Crown,) was to be an exception to this great general rule;—whether that, without which all the rest would be useless; should bend to a power, which shook none of the others;—whether, while a cause between two individuals resisted the storm of prerogative, and in the shape of a writ of error, survived dissolution,—a cause, instituted by the representatives for themselves and all the Commons of England, should give way to that power?—

In the present case the Lords were a jury impanelled to try Mr. Hastings;—a jury, who did not fall within the rules of other juries, but who were equally known to the constitution; and who could only be discharged from their duty, like all other juries, by a verdict. It could not with propriety be compared with the common trial by jury. When a jury was impanelled to try a cause, a Judge presided—the Judge took notes, but there was no stop to take down the question—no stop to receive the answer—no form which made the evidence, as it were, a record—all was done on the general impression, and, as it were, *uno flatu*. The jury could not separate till they had given their verdict; could neither eat, drink, nor take refreshment; and if they retired, must retire in custody of a bailiff, till they pronounced upon the prisoner whom they were impanelled to try. It was not so in the Court of the King in Parliament; there the Court adjourned and continued, *de die in diem*,—*de sessione in sessionem*, and, as was contended, *de Parlamento in Parlamentum*; and their proceedings and forms were all calculated to suit that constitution. The evidence was taken in a different manner. The question, instead of being asked of the witness, was put to the Court, by the Manager; the Chancellor presiding, put the question to the witness; that ques-

tion being first taken down by the clerk, who likewise, before another question was put, took down the answer given by the witness. Thus, not the general effect, but the precise terms were taken down, and preserved for the benefit of the Court; that as well those who were not present, as those, who from death, creation, &c. found their way into the Judicature, might legally give judgment either of condemnation or acquittal. Therefore, if the argument, founded on the demeanour of a witness not having been seen by the prosecutors, had any foundation, it applied more strongly to the Court: for if a person might judge, who had not seen a witness examined, surely the prosecutor might ask for judgment, under similar circumstances.

Hence the Court in which the Commons impeached, was the Court in which a Peer was tried; the same Court which tried writs of error; which in no case required the King to supply it with powers to enable it to act; but possessed those powers inherently, in its own nature and constitution. The Crown gave it a day; but, in the language of Mr. Justice Foster, it openeth at the beginning, and shutteth at the end of every session, as the King's Bench openeth and shutteth with the Term.

That in a question which concerned the welfare of the people, every consideration, except what had a tendency to promote that great object, became superseded.

Charles II. himself, in his speech from the throne, expressly said to the new Parliament, that he would not discharge the Earl of Danby, because he was under impeachment by the last, and ought to be tried in the new Parliament; a declaration which shewed that the King, acted on the clear, known, recognized law, not on any claim of the Commons. The House afterwards adopted the same ground. They sent word to the Lords, to remind them of the depending impeachment of Lord Danby. The Lords take it into consideration, and solemnly adjudge, that an impeachment is not discontinued by the dissolution of Parliament. It was not considered as a right regained or recovered; it was the clear, indubitable right of the Commons, in which the Lords acquiesced.

Were they satisfied with a bare acquiescence? When Lord Stafford was brought to trial, he pleaded the discontinuance. Did the Lords yield to it? They would not so much as suffer it to be argued. On the foundation of that privilege, Lord Stafford was tried, condemned, executed, and by the attainder, his whole line of succession annihilated.

It was remarked as a singular circumstance, that when their own Journals were free from any opinion, much less any instance of denial, they should be referred to the Journals of the House of Lords, to learn what were the privileges of the House of Commons. What was the popular argument, advanced for the discontinuance of the impeachment? That the evidence could not be known to the accusers personally, and that they must trust to written minits, of the truth of which, they were uncertain!—What was all this appeal to the heart, on the duty of hearing evidence *vivâ voce*, instead of reading it, when truly written? Was it to be established as a principle, that to the pure administration of justice, memory must alone assist the judgment, unrefreshed by minits? If an impeachment should last the whole possible length of a Parliament, the memory must hold out, as they could not conscientiously demand judgment, if their recollection was assisted by referring to the notes which had been taken; and unless they possessed memories of that retentive kind, they were to be deprived of all exercise of judgment.

Why should they, who had only to make up their minds on the evidence, to justify them in demanding judgment, require more precise means of knowledge, than the noble Lords who had to give judgment? Why set up a wild theory against plain sense? If they were not to judge on evidence so taken, in what a predicament did they place the Sovereign? To him, both in the exercise of the prerogative, of mercy, as well as in that of his most afflicting duty,—enforcing the execution of justice,—the chief Magistrate of the kingdom, had only written evidence, taken by others, to confide in. His Majesty could only judge from what he read, or from what he was told; yet it was never imagined, much less imputed to the existence of those Royal prerogatives, that the Royal judgment had been misled by defective evidence; which must be admitted, unless it should be stated that his Majesty was always, in fact, present in every Court, and master of every part of the evidence. Again were the times of Charles II. alluded to.

The guilt of Lord Danby was, perhaps, as much the guilt of the King, as his own. The King had employed his favourite to sell the interest of his people to a foreign power, and to barter away the dignity of his Crown, for a disgraceful pension to himself. Implicated in the crime, he was naturally anxious to protect the instrument of it, and for that purpose resorted to every exercise of prerogative, which the advice of his Minister, or his own ingenuity, could suggest. But every one of his measures, had a direct parliamentary condemnation. Fortunate it was for the country, fortunate for posterity, that the King had recourse to those *manœuvres*; because it had been the means of establishing, that no shift or evasion, no abuse of prerogative, no collusion between the Crown and the criminal, could defeat an impeachment by the Commons.—And of the times in which the resolution of 1678 was made, the opinion of the men who spoke of them, without reference to any particular question, but on a general view of our history and constitution, would far outweigh all that had been said, as applicable to the present case.*

There was a great distinction between the ordinary law, in the common courts of justice, and the constitutional law. For the former we should look to usage, where that could direct; but for the latter, to reason, in preference to usage; because in ordinary cases, *certainty*, was of more value than soundness of principle; but in constitutional law, soundness of principle was every thing. Certainty of usage, on a constitutional point, if it failed, served only to increase despair, and to drive to the last desperate remedy, for desperate cases. Hence the law of impeachment was not to be collected from the usage of courts of justice—for who was it meant to control? Not only men in high stations, who might commit crimes which the common law could not reach; but first and principally, the courts of justice themselves. If the power of impeachment be rendered nugatory, what security is there for the integrity of Judges, and the pure administration of justice? And with regard to the force of precedents on constitutional points, had the dispensing power claimed by the Stuarts, been decided by precedent, it might, perhaps, have been found to be good. But would any man regard a precedent in such a case? Must it not be perceived, that a Legislature and a dispensing power in the Crown, were incompatible; and that whenever any usage appeared, subversive of the constitution, if it had lasted for centuries, it was not precedent, but usurpation?

* Blac. Com. 4 V. oct. 439.

But they had, it seemed, no knowledge of the proceedings, on the impeachment, during the late Parliament;—there was no evidence on which they could judge, whether any thing had been proved by the Managers appointed by the late House of Commons. They could listen only to oral evidence; the minits of the evidence taken down and printed by direction of the Lords! for their own information were of no use whatever. To that the daily practice of the Court of King's Bench, afforded the most satisfactory answer. It was well known that nine-tenths of misdemeanors were tried at sittings, and the record being returned to the Court from whence it issued, sentence was there pronounced, by Judges, who had heard no part of the evidence—who had seen nothing of the demeanor of the prisoner, or of the witnesses—who had no knowledge either of the case, or of its circumstances, but what they derived from the notes of the Judge who tried the cause. Affidavits, both in extenuation and aggravation, might be, and constantly were, produced and read; and on that sort of evidence, which was thus gravely represented as no evidence at all;—on the written evidence of a note book, with the addition sometimes of written affidavits; on evidence of such authority, learned gentlemen, when advanced to the Bench, would decide, whether a fellow-subject should be fined a shilling, or ten thousand pounds—whether he should be imprisoned for a week, or for a year. That it had been asked, if all their proceedings did not cease with a dissolution? Precisely those, it was answered, which ceased on prorogation. On prorogation, all votes of money, all bills depending, fell to the ground. So they did on a dissolution. By prorogation, the state of an impeachment was not affected. No more was it affected by a dissolution. During the interval occasioned by either, the High Court of Parliament could not sit, any more than the Courts of Common Law, in the interval between Term and Term; and when Parliament met after either, judicial proceedings were taken up, *in statu quo*, just as in the Courts below, after a vacation.

They had on their own Journals an express declaration, that an impeachment did not abate by dissolution of Parliament; a declaration acquiesced in by the Lords, repeatedly acted upon by the Commons, and never once contradicted by any subsequent declaration; and it was strange indeed to hear those who had *laid it down* as a principle, that an order of any competent Court, acquiesced in for a series of years, and never afterwards annulled, made law—advising the House of Commons to consult the Journals of the Lords, for the purpose of turning aside the clear and uniform stream of the law of Parliament, as it appeared on their own, for more than a century. Were any man to affirm, in defiance of the act of Queen Anne, that Parliament had no right to interfere with the descent of the Crown—that the act of settlement was not law, and that the House of Stuart, and not the House of Brunswick, had the only legal right to it—no one would feel an apprehension that the proposition might be true; but would desire time to recover from his astonishment, to repress the indignation which it must naturally excite, and to obtain for it such a free and temperate discussion, as might procure the most solid and effectual condemnation of a doctrine so absurd and extravagant. Such a discussion the question before the House had received; and great as were the advantages which the nation had derived from the accession of the House of Brunswick to the Throne, the decision of it was of as much importance to the constitution and the future happiness of the people, as whether the succession should continue in that House, or revert to the House of Stuart. That next to

pendent, free-born spirit of the people, the law of impeachment was the only security for the undisturbed enjoyment of their lives and liberties. It was the only security against the vices of Government; and let no man, by neglecting or annihilating that, reduce them to the necessity of having recourse to it. To declare that an impeachment did not abate by dissolution of Parliament with a view to prevent the improper interference of the Crown, had been *treating the lion with a cobweb*. After the privilege was asserted and denied, the King, it was said, might dissolve the Parliament, when the Lords at the point of pronouncing a prisoner guilty, or after he had been found guilty before judgment was given; and so afford him the means of escape; might create fifty new Peers in a day, for the purpose of acquitting a state prisoner. All this was undoubtedly true. Though every one would lament to see the power of creating Peers abused, yet they would much more lament to see it taken away; and it was a possible evil, against which they could provide no remedy. But whenever ingenuity could point out some possible abuse, which they could not provide, were they to give up every security against it, which the constitution had put into their hands? No human form of government was ever yet so perfect, as to guard against every possible abuse of power, and the subjects of every government must bear with some. But when abuse became so frequent, or enormous, as to be oppressive and intolerable, threatening the destruction of Government itself, then it was that the last resort must be applied—that the free spirit of the people must put into action, the moral power to redress those grievances, for which they had no peaceable means of redress, and assert their indefensible right to a just and equitable government. No man would deny, that cases might occur, in which the subjects could have no choice but slavery, or resistance; no man would then say what their choice ought to be; and it was the best wisdom of government, not to create a necessity for resistance, by depriving the people of constitutional means of redress. The alternative every good man must deem too dreadful in its probable consequences; and whenever sad necessity urged it on, every individual, who had a heart to feel for the calamities of the country, must deplore the exigency of the times. Nevertheless, they were to be considered as necessities in that House, with the eye of jealousy; and should tyranny be enforced, no doubt the gentlemen of the Long Robe, would contradict the principles which they had chosen to deliver, by their actions; and prove, by their zeal and activity, that they were as ready to lay down their lives in defence of their freedom, as any description of men whatever. That the right of impeachment proceeding, without abatement, from Session to Session, and from Parliament to Parliament—was the vital, the defensive principle of the constitution; which not only preserved it from internal decay; but protected it from internal injury; without which, every Office of executive power, every Office of judicial authority, might be exercised or abused, at the discretion of him who held, or of him who had the right of appointing to it. The motion was carried, without a division.* At a subsequent time, a

* Parl. Reg. by Debrett, 28 vol. fo. 150. where there is a list of the precedents.

similar question was debated in the House of Lords, and was attended with the like success. On the 16th May, 1791, it was moved, that "A Message be sent to the Commons to inform them that the Lords were ready to proceed on the "Trial of Warren Hastings, Esq." which passed in the affirmative, by a majority of 48—Contents 66—Not Contents 18.—*

dents from 18 Ed. 1. to 3 Geo. 1.—And for the course of this important debate, see the
a succinct historical account, of the various Annual Reg. for 1790, p. 63.
impeachments, which were referred to, in

* Id. 30 vol. fo. 189.

CHAP. IV.

Touching the Original of the Common Law of England.

THE kingdom of England, being a very ancient kingdom, has had many vicissitudes and changes, especially before the coming in of king William I. under several, either conquests or accessions, of foreign nations. For though the Britons were, as is supposed, the most ancient inhabitants, yet there were mingled with them, or brought in upon them, the Romans, the Picts, the Saxons, the Danes, and lastly, the Normans. And many of those foreigners were, as it were, incorporated together, and made one common people and nation. Hence arises the difficulty, and indeed moral impossibility, of giving any satisfactory, or so much as probable conjecture, touching the original of the laws, for the following reasons:—

First, from the nature of laws themselves in general; which being to be accommodated to the conditions, exigencies, and conveniences of the people, for or by whom they are appointed, (a) as those exigencies and conveniences do insensibly grow upon the people, so many times there grows insensibly a variation of laws, especially in a long tract of time. And hence it is, that though for the purpose in some particular part of the common law of England, we may easily say, that the common law, as it is now taken, is otherwise than it was in that particular part, or point, in the time of Henry II. when Glanville wrote; or than it was in the time of Henry III. when Bracton wrote;—yet it is not possible to assign the certain time when the change began. Nor are we all the monuments, or memorials, either of acts of parliament, or of judicial resolutions, which might induce or occasion such alterations. For we have no authentic records of any acts of parliament, before 9 Hen. III. and those we have of that

(a) *Inventæ sunt leges ad salutem civium, civitatum que incolumitatem, itaque hominum & quietam & eam.* Cic. de Leg. l. 4. See Blac. Com. 1 v. 63. to 92, and 4 v. 409. *Summam divine mentis rationem,* (says

Hopperus, of the law) *et vocem cum bonitate et potentia conjunctam, quæ posita in Repub. jubet ea, quæ faciendæ sunt, et prohibet contraria.* L. 1. de Vera Jurisprud. tit. 20.

king's time, are but few. Nor have we any reports of judicial decisions, in any constant series of time, before the reign of Edward I.; though we have the plea rolls of the times of Henry III. and king John, in some remarkable order. So that use and custom, judicial decisions and resolutions, and acts of parliament, though not now extant, might introduce some new laws, and alter some old, which we now take to be the very common law itself, though the times and precise periods of such alterations are not explicitly, or clearly known. But though those particular variations and accessions have happened in the laws, yet they being only partial and successive, we may with just reason say, they are the same English laws now, that they were six hundred years since, in the general. As the Argonauts ship was the same when it returned home, as it was when it went out; though in that long voyage it had successive amendments, and scarce came back with any of its former materials;—and as Titius is the same man he was forty years since;—though physicians tell us, that in a tract of seven years, the body has scarce any of the same material substance it had before.

Secondly, the second difficulty in the search of the antiquity of laws and their original, is in relation to that people, unto whom the laws are applied; which, in the case of England, will render many observables, to shew it hard to be traced. For,

First, it is an ancient kingdom. And in such cases, though the people and government had continued the same, *ab origine*, as they say the Chinese did, till the late incursion of the Tartars, without the mixture of other people or laws; (a) yet it were an impossible thing, to give any certain account of the original of the laws of such a people; unless we had as certain monuments thereof, as the Jews had of theirs, by the hand of Moses (b). And that upon the following accounts. First, we have not any clear and certain monuments of the original foundation of the English kingdom, or state; when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain

(a) The Chinese are a very singular object for the attention of the world, as well on account of the extraordinary duration of their empire, as an unchangeable attachment to their maxims. —Attached to their ancient customs from taste, and to their ancient government from habit and from principle; they place their whole happiness in

obedience; unwilling to quit their station, provided their customs and their manners, which confirm the constitution of their country, be preserved; forgetting, however, that a slavish submission to national customs, not only perpetuates national errors, but deprives a nation of numerous advantages.

(b) Blac. Com. 4-v. 409.

and traditional. And since we cannot know the original of the planting of this kingdom, we cannot certainly know the original of the laws thereof, which may be well presumed to be very near as ancient as the kingdom itself (a). Again, secondly, though tradition might be a competent discoverer of the original of a kingdom or state, I mean oral tradition, yet such a tradition were incompetent without written monuments, to derive to us, at so long a distance, the original laws and constitutions of the kingdom. Because they are of a complex nature, and therefore not orally traducible to so great a distance of ages, unless we had the original, or authentic transcript of those laws, as the Jews had of their law; or as the Romans had of their laws of the Twelve Tables, engraven in brass (b). But yet further, thirdly, it is very evident to every day's experience, that laws, the further they go from their original institution, grow the larger, and the more numerous. In the first coalition of a people, their prospect is not great; they provide laws for their present exigence and convenience. But in process of time, possibly, their first laws are changed, altered, or antiquated, as some of the laws of the Twelve Tables, among the Romans, were. But whatsoever be done touching their old laws, there must of necessity be a provision of new and other laws, successively answering to the multitude of successive exigencies and emergencies, that in a long tract of time will offer themselves. So that, if a man could at this day have the prospects of all the laws of the Britons, before any invasion upon them, it would yet be impossible to say, which of them were new and which were old; and the several seasons and periods of time wherein every law took its rise and original; especially since it appears, that in those elder times, the Britons were not reduced to that civilized estate, as to keep the annals and memorials of their laws and government, as the Romans and other civilized parts of the world have done. It is true, when the conquest of a country appears, we can tell when the laws of a con-

(a) The history of past events is immediately lost or disfigured when intrusted to memory, or to oral tradition. The only certain means by which nations can indulge their curiosity, in researches concerning their remote origin, is to consider the language, the manners, and the customs of their ancestors, and to compare them with those of the neighbouring nations. As

to the Inhabitants of this Country, we have no credible testimony about them prior to the time of Julius Cæsar. No mention of its name, in Greek, before Polybius, who wrote about 150 years before Christ; nor in Latin, before Lucretius, who wrote about 50 years after Polybius.

(b) Blac. Com. 1 v. 80. seq.

quering people came to be given to the conquered. Thus we can tell, that in the time of Henry II. when the conquest of Ireland had obtained a good progress, and in the time of king John, when it was completed, the English laws were settled in Ireland (a). But if we were upon this inquiry, "what were the original of those English laws that were thus settled there;" we are still under the same quest and difficulty that we are now, viz. what is the original of the English laws.—For they that begin new colonies, plantations, and conquests, if they settle new laws, and which the places had not before, yet for the most part, I don't say altogether, they are the old laws which obtained in those countries from whence the conquerors or planters came.

Secondly, the second difficulty of the discovery of the original of the English laws is this:—that this kingdom has had many and great vicissitudes of people that inhabited it, and that in their several times prevailed and obtained a great hand in the government of this kingdom; whereby it came to pass, that there arose a great mixture and variety of laws; in some places, the laws of the Saxons; in some places, the laws of the Danes; in some places, the laws of the ancient Britons; in some places, the laws of the Mercians; and in some places, or among some people perhaps, the laws of the Normans. For although, as I shall shew hereafter (b), the Normans never obtained this kingdom by such a right of conquest as did or might alter the established laws of the kingdom; yet, considering that king William I. brought with him a great multitude of that nation, and many persons of great power and eminence, which were planted generally over this kingdom, especially in the possessions of such as had opposed his coming in, it must needs be supposed, that those occurrences might easily have a great influence upon the laws of this kingdom, and secretly and insensibly introduce new laws, customs, and usages (c): so that although the body and gross of the law might continue the same, and so continue the ancient denomination that it first had, yet it must needs receive divers accessions from the laws of those people that were thus intermingled with the ancient Britons or Saxons; as the rivers of Severn, Thames,

(a) Cap. 9.

(b) Cap. 5, 6.

(c) Blac. Com. 4 v. 409.—The Roll of Battle-Abbey, is said to be the foundation of the sur-names of many great

families. It is however of doubtful authority. Warren and Mortimer are accounted as ancient as any sur-names amongst us. Spelm. Rem. 146, 190.—Camd. Rem. 90, 94.

Trent, &c. though they continue the same denomination which their first stream had; yet have the accession of divers other streams added to them, in the tracts of their passage, which enlarge and augment them. And hence grew those several denominations of the Saxon, Mercian, and Danish laws, out of which, as before is shewn, the Confessor extracted his body of the common law. And therefore among all those various ingredients and mixtures of laws, it is almost an impossible piece of chymistry to reduce every *Caput Legis* to its true original; as to say this is a piece of the Danish, this of the Norman, or this of the Saxon or British law. Neither was it, or indeed is it much material, which of these is their original. For 'tis very plain, the strength and obligation, and the formal nature of a law, is not upon account that the Danes, or the Saxons, or the Normans; brought it in with them; but they became laws, and binding in this kingdom, by virtue only of their being received and approved here (a).

Thirdly, a third difficulty arises from those accidental emergencies that happened, either in the alteration of laws, or communicating or conveying of them to this kingdom. For first, the subdivision of the kingdom into small kingdoms under the Hierarchy, did most necessarily introduce a variation of laws; because the several parts of the kingdom were not under one common standard: and so it will soon be in any kingdoms that are canonized, and not under one common method of dispensation of laws, though under one and the same king. Again, the intercourse and traffic with other nations, as it grew more or greater, did gradually make a communication and transmigration of laws from us to them, and from them to us. Again, the growth of Christianity in this kingdom, and the reception of learned men from other parts, especially from Rome, and the credit that they obtained here, might reasonably introduce some new laws; and antiquate or abrogate some old ones, that seem less consistent with the Christian doctrines. And by this means were introduced, not only some of the judicial laws of the Jews, but also some points relating to, or bordering upon, or derived from the canon

(a) Law may be considered as a utility to which the members of the same community have agreed, and after which the magistrate and the subject continue to enjoy their rights, and to maintain the peace of society.

Mr. Hallam, has given a short, but correct sketch, of the Anglo-Saxon History, as connected with the English Constitution, in his valuable View of the State of Europe during the Middle Ages, 2 v. c. 8, 9, &c.

or civil laws; as may be seen in those laws of the ancient kings, Ina, Alfred, Canutus, &c. collected by Mr. Lambard (a).

Having thus far premised, it seems, upon the whole matter, an endless and insuperable business to carry up the English laws to their several springs and heads, and to find out their first original. Neither would it be of any moment or use if it were done. For whenever the laws of England, or the several *Capita* thereof began; or from whence or whomsoever derived; or what laws of other countries contributed to the matter of our laws; yet most certainly their obligation arises not from their matter, but from their admission and reception, and authorization in this kingdom. And those laws, if convenient and useful for the kingdom, were never the worse, though they were desumed and taken from the laws of other countries; so as they had their stamp of obligation and authority from the reception and approbation of this kingdom, by virtue of the common law; of which this kingdom has been always jealous, especially in relation to the canon, civil, and Norman law, for the reasons hereafter shewn (b).

Passing therefore from this unsearchable inquiry, I shall descend to that which gives the authority, viz. the formal constituents, as I may call them, of the common law. And they seem to be principally, if not only, those three, viz. 1. The common usage, or custom, and practice of this kingdom, in such parts thereof as lie in usage or custom; 2. The authority of parliament, introducing such laws: and, 3. The judicial decisions of courts of justice, consonant to one another, in the series and succession of time.

1. As to the first of these, *USAGE AND CUSTOM* generally received, do *obtinere vim Legis*, and is that which gives power, sometimes to the canon law, as in the ecclesiastical courts; sometimes to the civil law, as in the admiralty courts; and again, controuls both, when they cross other customs that are generally

(a) That the civil law is intimately connected with the municipal jurisprudence in several countries of Europe, is a fact so well known, that it needs no illustration. Though our common law is supposed by some to form a system perfectly distinct from the Roman code, and however we may affectedly boast of the distinction, yet it is evident that many of the ideas and maxims of the civil law are incorporated into the En-

glish jurisprudence. This is well illustrated by Mr. Barrington, *Observ. on Stat. 76, seq.* "The laws of all nations (said chief justice Holt) are doubtless raised out of the ruins of the civil law; it must be owned that the principles of our law are borrowed from the civil law, and therefore grounded on the same reason in many things." 12 Mod. 482.

(b) Cap. 5.

received in the kingdom. This is that which directs descents; as settled some ancient ceremonies and solemnities in conveyances, wills, and deeds, and in many more particulars. And if it be enquired, what is the evidence of this custom, or wherein it consists, or is to be found? I answer, it is not simply an unwritten custom, nor barely orally derived down from one age to another; but it is a custom that is derived down in writing, and transmitted from age to age; especially since the beginning of Edward I. to whose wisdom the laws of England owe almost as much as the laws of Rome to Justinian (a).

III. ACTS OF PARLIAMENT. And here it must not be wondered at, that I make acts of parliament one of the authoritative constituents of the common law, though I had before contradistinguished the one from the other. For we are to know, that though the original or authentic transcripts of acts of parliament are not before the time of Henry III. and many that were in his time are perished and lost; yet CERTAINLY SUCH THERE WERE; and many of those things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record (b). And if in the next age, the statutes made in the time of Henry III. and Edward I. were lost, yet even those would pass for parts of the common law. And indeed, by long usage and the many resolutions grounded upon them, and by their great antiquity, they seem even already to be incorporated with the very common law. That this is so, may appear, though not by records, for we have none so ancient, yet by an authentic and unquestionable history, wherein a man may, without much difficulty, find, that many of those *Capitula Legum* that are now used and taken for common law, were things enacted in parliaments or great councils under William I. and his predecessors, kings of England, as may be made appear hereafter. But yet, those constitutions and laws being made before time of memory, do now obtain, and are taken as part of the common law and immemorial customs of the kingdom. And so they ought now to be esteemed, though in their first original they were acts of parliament.

3. JUDICIAL DECISIONS. It is true, the decision of courts of justice, though by virtue of the laws of this realm they do

(a) Blac. Com. 1 v. 68.

(b) Vide the case of Collins and

Blantern, Wils. par. 2. 348, 351, and the first chapter of this History.

bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attain; yet they do not make a law, properly so called;—for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever—(a).

First, because the persons who pronounce those decisions, are men chosen by the king for that employment, as being of greatest learning, knowledge, and experience in the laws, than others. Secondly, because they are upon their oaths, to judge according to the laws of the kingdom. Thirdly, because they have the best helps to inform their judgments. Fourthly, because they do, *sedere pro tribunali*, and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed, or avoided (b).

Now judicial decisions, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds.

First, they are either such as have their reasons singly in the laws and customs of the kingdom. As, who shall succeed as heir to the ancestor;—what is the ceremony requisite for passing a freehold;—what estate, and how much shall the wife have for her dower; and many such matters, wherein the ancient and express laws of the kingdom give an express decision, and the judge seems only the instrument to pronounce it. And in these things, the law or custom of the realm, is the only rule and measure to judge by; and in reference to those matters, the decisions of courts are the conservatories and evidences of those laws.

Secondly, or they are such decisions, as by way of deduction and collation upon those laws, are framed or deduced. As for the purpose, whether of an estate thus, or thus limited, the wife shall

(a) An opinion, though erroneous, concluding to the judgment of a court, is a judicial opinion; because it is not only delivered under the sanction of the judge's oath, but on mature deliberation. But an extra-judicial opinion, whether given in or out of court, is no more than the *prolatum* of him who gives it; it has no legal efficacy. So,

an opinion given in court, if not necessary to the judgment, is extra-judicial. Vaugh. 382.

(b) Blac. Com. 1 v. 69, seq. Id. 267. Fortesc. de Laud. cap. 8. Seld. Review of Tith. cap. 8. 13 W. 3. cap. 2. 1 Geo. 3. cap. 23. and De Lolme, cap. 8.

be endowed;—whether if thus, or thus limited, the heir may be barred; and infinite more of the like complicated questions. And herein the rule of decision is, first, the common law and custom of the realm, which is the great *substratum* that is to be maintained; and then authorities or decisions of former times, in the same or the like cases; and then the reason of the thing itself (a).

Thirdly, or they are such as seem to have no other guide but the common reason of the thing, unless the same point has been formally decided. As in the exposition of the intention of clauses in deeds, wills, covenants, &c. where the very sense of the words, and their positions and relations, give a rational account of the meaning of the parties. And in such cases, the judge ~~has~~ much better herein, than what a bare grave grammarian, or logician, or other prudent man could do. For in many cases ~~have~~ been former resolutions, either in point, or agreeing in reason or analogy with the case in question; or, perhaps also, the ~~clause~~ to be expounded is mingled with some terms or clauses that require the knowledge of the law, to help out with the construction or exposition: both which do often happen in the same case; and therefore it requires the knowledge of the law, to render and expound such clauses and sentences. And doubtless, a good common lawyer is the best expositor of such clauses, &c. (b).

(a) This source of decision is called "*prætorum memoria eventorum*."

(b) Plowd. 122. seq. 140. seq. Thus the practice and decisions of courts acquire the authority of laws; every pro-

ceeding is conducted by some fixed and determinate rule; and the best and most effectual precautions are taken for the impartial application of rules to particular cases.

CHAP. V.

*How the Common Law of England stood at and for some time after
the coming in of King William I.*

It is the honour and safety, and therefore the just desire of kingdoms that recognize no superior but God, that their laws have these two qualifications. First, that they be not dependent upon any foreign power; for a dependency in laws, derogates from the honour and integrity of the kingdom, and from the power and sovereignty of the prince thereof. Secondly, that they taste not of bondage or servitude; for that derogates from the dignity of the kingdom, and from the liberties of the people thereof.

In relation to the former consideration, the kings of this realm, and their great councils, have always been jealous and careful, that they admitted not any foreign power; especially such as pretended authority to impose laws upon other free kingdoms or states; nor to countenance the admission of such laws here, as were derived from such a power.

Rome, as well ancient as modern, pretended a kind of universal power and interest; the former by their victories, which were large, and extended even to Britain itself; and the latter, upon the pretence of being universal bishop, or vicar general, in all matters ecclesiastical. So that upon pretence of the former, the civil law, and upon pretence of the latter, the canon law, was introduced, or pretended to some kind of right, in the territories of some absolute princes, and among others here in England. But this kingdom has been always very jealous of giving too much countenance to either of those laws, and has always shewn a just indignation and resentment against any incroachments of this kind, either by the one law or the other. It is true, as before is shewn, that in the admiralty and military courts, the civil law has been admitted;—and in the ecclesiastical courts, the canon law has been, in some particulars, admitted: but still they carry such marks and evidences about them, whereby it may be

n that they bind not, nor have the authority of laws themselves, but from the authoritative admission of this
lom.

nd as thus the kingdom, for the reasons before given, never
rted the civil or the canon law, to be the rule of the adminis-
n of common justice in this kingdom; so neither has it
red any laws to be imposed upon the people, by any right of
uest; as being unsuitable to the honour or liberty of the
ish kingdom, to recognize their laws as given them at the
nd pleasure of a conqueror. And hence it was, that although
eople unjustly assisted king Henry IV. in his usurpation of
rown, yet he was not admitted thereunto, until he had de-
d, that he claimed not as a conqueror (a), but as a succes-
b). Only he reserved to himself the liberty of extending a
nce of conquest against the Scroops, that were slain in
; against him; which yet he durst not rest upon without a
rmation in parliament. Vide Rot. Parl. 1 H. 4. No. 56. &
2. ibid. No. 17. (A).

His right as a conqueror was avowed, it was only insinuated. he could; and in the end, he left him-
See Knyghton 2757. Henry self, in the eyes of men of sense, no
d up a title in the best manner foundation of right, but his possession.

Henry IV. did not claim the crown as a conqueror, though he was very
inclined so to do,* but as a successor, by descent, from the right line of the
royal.

order to this he set up two titles: one, upon the pretence of being the first
: blood royal, in the entire male line, whereas the duke of Clarence left
one daughter Philippa; from which female branch, by a marriage with
nd Mortimer, Earl of March, the house of York descended: the other, by
g an exploded rumour, first propagated by John of Gaunt, that Edmund
f Lancaster, to whom Henry's mother was heiress, was in reality the elder
r of king Edward I. though his parents, on account of his personal defor-
had imposed him on the world for the younger; and therefore Henry
be entitled to the crown, either as successor to Richard II. in case the
male line was allowed a preference to the female; or, even prior to that
unate prince, if the crown could descend through a female, while an entire
ine was existing.

owever, as in Edward the Third's time we find the parliament approving
ffirming the law of the crown, so in the reign of Henry IV. they actually
d their right of new settling the succession to it. And this was done by
ute 7 Hen. IV. c. 2. whereby it is enacted, "that the inheritance of the
wn and realms of England and France, and all other the king's dominions,

* Seld. Tit. Hon. 1. 3.

And upon the like reason it was, that king William I. though he be called the Conqueror (*a*), and his attaining the crown here, is often in history, and in some records, called *CONQUESTUS ANGLIÆ*; yet in truth it was not such a conquest as did, or could alter the laws of this kingdom; or impose laws upon the people *per modum conquestus*, or *jure belli*. And therefore, to wipe off that false imputation upon our laws, as if they were the fruit, or effect of a conquest, or carried in them the badge of servitude to the will of the Conqueror, which notion some ignorant and prejudiced persons have entertained, I shall rip up, and lay open this whole business from the bottom, and to that end enquire into the following particulars, viz.

First, of the thing called conquest; what it is when attained; and the rights thereof.

Secondly, of the several kinds of conquest, and their effects, as to the alteration of laws by the victor.

Thirdly, how the English laws stood at the entry of king William I.

Fourthly, by what title he entered; and whether by such a right of conquest as did, or could, alter the English laws.

Fifthly, whether *de facto* there was any alteration of the said laws, and by what means, after his coming in.

First touching the first of these, viz. Conquest, what it is when attained, and the rights thereof. It is true, that it seems to be

“shall be set and remain* in the person of our sovereign lord the king, and in the heirs of his body issuing;” and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king’s sons, and the heirs of their bodies respectively. Which is indeed nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It however serves to shew, that it was then generally understood, that the king and Parliament had a right to new-model and regulate the succession to the crown. And we may observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry’s original title. However, sir Edward Coke more than once expressly declares,† that at the time of passing this act, the right of the crown was in descent from Philippa, daughter and heir of Lionel duke of Clarence.‡

* *Soit mys et demoerge.*

‡ *Blac. Com. 1 v. 202.*

† *4 Inst. 37. 205.*

(a) He is said, never to have sur-named himself Conqueror; nor was ever called so, in his lifetime, in any

letters patent or grants which he executed.

ed as a kind of law among all nations, that in case of a war between supreme princes, the conqueror acquires a right of dominion, as well as a property over the things and persons that are fully conquered (a). The reasons assigned are principally these, viz.

1st, because both parties have appealed to the highest tribunal that can be, viz. the trial by war; wherein the great Judge and Sovereign of the world, the Lord of Hosts, seems in a more impartial manner than in other cases, to decide the controversy. 2dly, because unless this should be a final decision, mankind would be destroyed by endless broils, wars, and contentions; 3dly, for the preservation of mankind, this great decision should be final, and the conquered ought to acquiesce in it (b). 4thly, because if this should not be admitted, and be, as it is by the tacit consent of mankind, accounted a lawful acquisition, there would not be any security or peace under any government. For by the various revolutions of dominion acquired by various means, have been, and are to this day, the successions of kingdoms and states preserved. What was once the Romans, afterwards the Grecians; and before them, the Persians; and before the Persians, the Assyrians. And, if this just victory, should not be allowed to be a firm conquest of dominion, the present possessors would be still obnoxious to the claim of the former possessors, and so they would be in a restless state of doubts, fears, and changes, upon the pretension of former claims; 5thly, to cut off this instability and unsettledness in dominion and property, it would seem that the common consent of all nations tacitly submitted, that acquisition by right of conquest, in solemn war between persons, not subjects of each other by ties of allegiance or fidelity, should be allowed as one of the titles of acquiring dominion over the persons, places, and things so conquered.

6thly, whatever be the real truth or justice of this position, yet it is much at a loss touching the things *in hypothesi*; viz. whether it be the effect of every kind of conquest? Whether the

(a) the opinion of Grotius, he holds the subjection upon the whole to be whether it be a state, or only a person; and whether that subjection be civil, mixed, or despotic. De Jure Belli ac Pacis l. 8. c. 8. Seneca de Consolatione ad Polybium. — Vide. Contro-

vers. 2 v. Contr. xxxiv. 390. edit. Gron. Major.

(b) See the Dissertation of Cocceius de Jure Victoriæ Diverso a Jure Belli, sect. 23. but Freuer has attempted to refute the opinion of Cocceius, in his notes upon Puffendorf de Offic. Hom. & Civ. l. 2. c. 16. sect. 13.

war be just or unjust? What are the requisites to the constituting of a just war (a)? Who are the persons that may acquire? and, What are the solemnities requisite for that acquiescence? But above all, the greatest difficulty is, when there shall be said such a victory as acquires this right? Indeed if there be a total delection of every person of the opposing party or country, then the victory is complete, because none remains to call it in question. But suppose they are beaten in one battle, may they not rally again? or if the greater part be subdued, may not the lesser keep their ground? or if they do not at the present, may they not in the next age regain their liberty? or if they be quiet for a time, may they not, as they have opportunity, renew their pretensions? And although the victor, by his power, be able to quell and suppress them, yet he is beholden to his sword for it; and the right that he got by his victory before, would not be sufficient, without a power and force to establish and secure him against new troubles. And on the other side, if those few subdued persons can by force regain what they once had a pretence to, a former victory will be but a weak defence; and if it would, they would have the like pretence to a claim of acquiescence by victory over him, as he had over them.

It seems, therefore, a difficult thing to determine, in what indivisible moment, this victory is so complete, that *jure belli*, the acquiescence of dominion is fully gotten. And therefore victors are used to secure themselves against disputes of that kind; and as it were to under-pin their acquiescence *jure belli*—(that they might not be lost by the same means whereby they were gained)—by the continuation of eternal forces of standing armies, castles, garrisons, munitions, and other acts of power and force; so as thereby to overbear and prevent an ordinary possibility of the prevailing of the conquered or subdued people against the conqueror or victor. He that lays the weight of his title upon victory, or conquest, rarely rests in it, as a complete conquest, till he has added to it somewhat of consent or faith of the conquered, (b) submitting voluntarily to him. Then, and not till then, he thinks his title secure, and his conquest complete. And indeed, he has no reason to think his title can be otherwise secure; for where the

(a) Of a just and solemn war, according to the right of nations, see Grot. l. 3. c. 3.

(b) In such case the acquisition is

lawful, and that whether the war be just, or unjust. Grot. l. 3. c. 8. sect. 1. note 1. l. 3. c. 19. sect. 11. note 1. Puffendorf, l. 8. c. 8. sect. 1.

is merely force or power, his title will fail, if the conquered with like force or power over-match his, and so regain their former interest or dominion.

Now this consent is of two kinds, either expressed, or implied.

An express consent is, when after a victory, the party conquered, do expressly submit themselves to the victors, either fully or absolutely;—by dedition, yielding themselves; giving their faith and their allegiance; or else, under certain pacts, conventions, agreements, or capitulations. As when the subdued, either by themselves, or by substitutes, or delegates by them chosen, do yield their faith and their allegiance to the victor, upon certain pacts or agreements between them; as, for continuing or continuing their religion, their laws, their form of civil administration, &c.

And thus, though force were perhaps the occasion of this consent, yet in truth, it is consent only, that is the true proximate and fixed foundation of the victor's right; which now, no longer rests barely upon external force, but upon the express consent and assent of the subdued people: consequently, this pact or convention, is that which is to be the immediate foundation of that dominion. And upon a diligent observation, of most acquisitions made by conquest, or so called, we shall find this to be the conclusion of almost all victories. They end in deditions and capitulations, and faith given to the conqueror; whereby, often the former laws, privileges, and possessions are confirmed to the subdued; without which, the victors seldom continue long quiet in their new acquisitions, without extreme expense, force, severity, and hazard.

An implied consent is, when the subdued do continue for a long time, quiet and peaceable under the government of the victor; accepting his government; submitting to his laws; taking upon them offices and employments under him; and obeying him as their governor, without opposing him, or claiming their former right. This seems to be a tacit acceptance and assent to him. And though this is gradual, and possibly determinate time is stinted, wherein a man can say, this year, this month, or this day, such a tacit consent was completed and concluded;—for circumstances may make great variations in the sufficiency of the evidence of such an assent;—yet, by a long and quiet tract of peaceable submission to the laws and govern-

ment of the victor, men may reasonably conjecture, that the conquered have relinquished their purpose of regaining by force, what by force they lost.

But still, all this is intended of a lawful conquest by a foreign prince or state, and not an usurpation by a subject, either upon his prince, or fellow subjects. For, several ages and descents, do not purge the unlawfulness of such an usurpation.

Secondly, concerning the several kinds of conquest, and their effects, as to the alteration of laws by the victor. There seems to be a double kind of conquest, which induces a various consideration touching the change of laws; viz. *victoria in regem & populum, & victoria in regem tantum.*

The conquest over the people or country, is when the war is denounced by a foreign prince or state, and no subject; and when the intention and denunciation of the war is against the king and people or country; and the pretension of title is by the sword, or *jure belli*. Such were most of the conquests of ancient monarchs, viz. the Assyrian, Persian, Grecian, and Roman conquests. And in such cases, the acquisitions of the victor were absolute and universal. He gained the interest and property of the very soil of the country subdued; which the victor might, at his pleasure, give, sell, or *arrent*. He gained a power of abolishing or changing their laws and customs; and of giving new, or, of imposing the law of the victor's country. But although this the conqueror might do, yet a change of the laws of the conquered country was rarely universally made, especially by the Romans; who, though in their own particular colonies, planted in conquered countries, they observed the Roman law; which possibly might by degrees, without any rigorous imposition, gain and insinuate themselves into the conquered people, and so gradually obtain, and insensibly conform them, at least so many of them as were *conterminous* to the colonies and garrisons, to the Roman laws; yet they rarely made a rigorous and universal change of the laws of the conquered country, unless they were such as were foreign and barbarous, or altogether inconsistent with the victor's government. But in other things, they commonly indulged unto the conquered, the laws and religion of their country, upon a double account, viz.

First, on account of humanity; thinking it a hard and over-severe thing, to impose presently upon the conquered, a change of their customs, which long use had made dear to them. And,

secondly, upon the account of prudence; for the Romans, being a wise and experienced people, found that those indulgencies made their conquests the more easy, and their enjoyments thereof the more firm. Whereas a rigorous change of the laws and religion of the people, would render them in a restless and unquiet condition, and ready to lay hold of any opportunity, of defection or rebellion, to regain their ancient laws and religion, which ordinary people count most dear to them. Though at this day, the indulgence of a Paganish religion is not used to be allowed by any Christian victor, as is observed in Calvin's case, in the Seventh Report. To give one instance for all, it was upon this account, that though the Romans had wholly subdued Syria and Palestina, yet they allowed to the inhabitants the use of their religion and laws, so far forth as consisted with the safety and security of the victor's interest. And therefore, though they reserved to themselves the cognizance of such causes, as concerned themselves, their officers, or revenues; and such cases as might otherwise disturb the security of their empire—as treasons, insurrections, and the like; yet it is evident, they indulged the people of the Jews, &c. to judge by their own law; not only of some criminal proceedings, but even of capital, in some cases; as appears by the history of the Gospels and Acts of the Apostles.

But still this was but an indulgence, and therefore was resumable by the victor; unless there intervened any capitulation between the conqueror and the conquered to the contrary, which was frequent; especially in those cases when it was not a complete conquest, but rather a dedition upon terms and capitulations, agreed between the conqueror and the conquered; wherein usually, the yielding party secured to themselves, by the articles of their dedition, the enjoyment of their laws and religion; then by the laws of nature and of nations, both which oblige to the observation of faith and promises, those terms and capitulations were to be observed. Again, secondly, when after a full conquest, the conquered people resumed so much courage and power, as began to put them into a capacity of regaining their former laws and liberties; this commonly was the occasion of terms and capitulations, between the conquerors and conquered. Again, thirdly, when by long succession of time, the conquered had either been incorporated with the conquered people, whereby they had worn out the very marks and discriminations between the conquerors and conquered; and if they continued distinct,

yet by a long prescription, usage and custom, the laws and rights of the conquered people were in a manner settled; and the long permission of the conquerors, amounted to a tacit concession or capitulation, for the enjoyment of their laws and liberties.

But of this, more than enough is said, because it will appear in what follows, that William I. never made any such conquest of England.

Secondly, therefore I come to the second kind of conquest, viz. that which is only *victoria in regem*. And this is where the conqueror either has a real right to the crown or chief government of a kingdom, or at least has, or makes some pretence, or claim, thereunto; and, in pursuance of such claim, raises war, and by his forces obtains what he so pretends a title to. Now this kind of conquest, does only instate the victor in those rights of government, which the conquered prince, or that prince to whom the conqueror pretends a right of succession, had; whereby he becomes only a successor *jure belli*, but not a victor, or conqueror upon the people; and therefore, has no more right of altering their laws, or taking away their liberties or possessions, than the conquered prince, or the prince to whom he pretends a right of succession, had. For the intention, scope, and effect of his victory, extends no further than the succession, and does not at all affect the rights of the people. The conqueror is, as it were, the plaintiff; the conquered prince is the defendant; and the claim is, a claim of title to the crown. And because each of them pretends a right to the sovereignty, and there is no other competent trial of the title between them, they put themselves upon the great trial by battle^(a); wherein there is nothing in question touching the rights of the people, but only touching the right of the crown; and that being decided by the victory, the victor comes in as a successor, and not *jure victoriæ*, as in relation to the people's rights; the most sacred whereof are, their laws and religion.

Indeed, those that do voluntarily assist the conquered prince, commonly undergo the same hazard with him, and do, as it were, put their interest upon the hazard and issue of the same trial; and therefore commonly fall under the same severity with the conquered, at least *de facto*; because, perchance, the victor thinks he cannot be secure without it. Yet usage, and indeed common prudence, makes the conquerors use great moderation and discri-

(a) Vide cap. 6, note (a), p. 145.

mination, in relation to the assistants of the conquered prince; and to extend this severity only to the eminent and busy assistants of the conquered; and not to the *gregarii*, or such as either by constraint or by necessity, were enforced to serve against him. And as to those also, on whom they exercise their power, it has been rarely done *jure belli aut victoriae*, but by a judiciary proceeding, as in cases of treason; because now, the great title by battle, has pronounced for the right of the conqueror; and at present, no man must dare to say otherwise now, whatsoever debility was in his pretension or claim. We shall see the instances hereof a while follows.

Thirdly, as to the third point, how the laws of England stood at the entry of king William I. It seems plain, that at the time of his entry into England, the laws commonly called the laws of Edward the Confessor, were then the standing laws of the kingdom (a). Hoveden tells us, in a digression under his History of king Henry II. that those laws were originally put together by king Edgar, who was the Confessor's grandfather, viz.

“Verum tamen post mortem ipsius regis Edgari usque ad coronationem sancti regis Edvardi quod tempus continet sexaginta & septem annos prece (vel pretio) leges sopitæ sunt & jus prætermittæ sed postquam rex Edvardus in regno fuit sublimatus concilio baronum Angliæ (b) legem annos sexaginta & septem sopitam, excitavit & confirmavit, & ea lex sic confirmata vocata est lex sancti Edvardi, non quod ipse prius invenisset eam sed cum prætermittæ fuisset et oblivioni penitus dedita a morte avi sui regis Edgari qui primus inventor ejus fuisse dicitur usque ad sua tempora, viz. sexaginta & septem annos.” And the same passage, *in totidem verbis*, is in the History of Litchfield, cited in Sir Robert Twisden's Prologue to the Laws of King William I. But although possibly, those laws were collected by king Edgar, yet it is evident, by what is before said, they were augmented by the Confessor, by that extract of laws before-mentioned; which he made out of that three-fold law that obtained in several parts of England, viz. the Danish, the Mercian, and the West-Saxon laws.

This manual, as I may call it, of laws, styled the Confessor's Laws, was but a small volume, and contains but few heads; being rather a scheme, or directory, touching some method to be observed in the distribution of justice, and some particular proceed-

(a) Ante, cap. 1.

(b) 4 Inst. 47, 48. Mat. Par. 865.

ings relative thereunto; especially in matters of crime, as appears by the laws themselves, which are now printed in Mr. Lambard's Saxon laws, p. 133, and other places. Yet the English were very zealous for them, no less or otherwise than they are at this time, for the Great Charter, insomuch, that they were never satisfied till the said laws were reinforced and mingled, for the most part, with the coronation oath of king William I. and some of his successors.

And this may serve shortly touching this third point; whereby we see that the laws that obtained at the time of the entry of king William I. were the English laws, and principally those of Edward the Confessor.

Fourthly, the fourth particular is, the pretensions of king William I. to the crown of England, and what kind of conquest he made. This will be best rendered and understood, by producing the history of that business, as it is delivered over to us by the ancient historians, that lived in or near that time. The sum, or *totum* whereof is this.

King Edward the Confessor, having no children, nor like to have any, had three persons related to him, whom he principally favoured, viz. first,

Edgar Ætheling, the son of Edward, the son of Edmond Ironside. MATT. PARIS, anno 1066. "Edmundus autem "Latus Ferreum rex naturalis de stirpe regum genuit Edwardum " & Edwardus genuit Edgarum cui de jure debebatur regnum "Anglorum."

Secondly, Harold, the son of Goodwin earl of Kent, the Confessor's father-in-law; he having married earl Goodwin's daughter. And thirdly,

William duke of Normandy; who was allied to the Confessor thus, viz. William was the son of Robert (a), the son of Richard

(a) William duke of Normandy, surnamed the Bastard, was the son of Robert the second, by Harlotta, the daughter of a tanner in Falaise. Brompton, 910. Our ancient historians differ about the name of William's mother. Abbot Brompton calls her Arlet; and so does the ancient chronicle of Normandy. Knyghton nominates her Arlee; others call her Herleva; which last may probably be right; most of the French writers, especially the moderns, calling her Herleve. Writers are better

agreed as to her family; for they say, in general, that she was a tanner's daughter. A French author, however, of great integrity, reports the matter differently in all respects. He says her name was Helena, and that she was not the daughter of a tanner, but of one Foubert, valet-de-chambre to the Duke of Normandy, which Foubert was the son of a tanner. *Recueil des Rangs des Grands de France*, par. 1. du Tillet. p. 137. William was so little ashamed of his birth, that he

of Normandy, which Richard was brother unto the Conqueror's mother. Vide Hoveden, sub initio anni primi Willielmi i.

There was likewise a great familiarity, as well as this alliance, seen the Confessor and duke William; for the Confessor had made considerable residences in Normandy; and this gave an expectation to duke William, of succeeding him in this dom. And there was also, at least, pretended, a promise given him by the Confessor, that duke William should succeed in the crown of England (B). And because Harold was in

and the appellation of Bastard, in his letters and charters. Spelm. in verb. *bastardus*. Camden in *midshire*. Notwithstanding his meanness, and the meanness of his father, he had been allowed to succeed the duchy, to his father, though without a very dangerous and fac-

tious opposition: which he had the good fortune to subdue, by the prudent care of his guardians and his own ability. The character of William, is well drawn, by Lord Lyttleton, Hist. Hen. II. 1 v. oct. 70. He had many great qualities, but few virtues;—much to admire, more to abhor.

) Though the inveterate prepossessions of Edward kept him from seconding the pretensions of Harold, yet he took but feeble and irresolute steps for securing the succession to the duke of Normandy. The whole story of the transactions between Edward, Harold, and the duke of Normandy, is told so differently by the ancient writers, that there are few important passages of the history, liable to so great uncertainty. It does not seem likely, as some have supposed, that Edward ever executed a will in the duke's favour, much less that he got it ratified by the states of the kingdom, as is affirmed by others. The duke could not have been known to all, and would have been produced by the Conqueror, to whom it gave so plausible a title; but the doubtful and ambiguous manner in which he seems always to have mentioned it, proves, that he could not lead the known intentions of that monarch in his favour, which he was bound to call a will. There is indeed a charter of the Conqueror, preserved by Simeon of Dunelm, (vol. 1.) where he calls himself *rex hereditarius*, meaning heir by right, but a prince possessed of so much power, and attended with so much success, may employ what pretences he pleases. It is sufficient to refute his pretence to observe, that there is a great diffidence and variation among the historians with regard to a point, which, had it been real, must have been agreed upon by all of them.

As to the circumstance of Harold's contract with the duke, in Normandy, historians, particularly Malmesbury and Matthew Westminster, affirm that Harold had no intention of going over to Normandy, but that taking the air in a pleasure-boat on the coast, he was driven over, by stress of weather, to the shores of Guy, Count of Ponthieu: but besides that this story is not probable itself, and is contradicted by most of the ancient historians, it is refuted by a serious and authentic monument. It is a tapestry preserved in the ducal palace of Rouen, and supposed to have been wrought by orders of Matilda, wife of Emperor; at least, it is of very great antiquity. Harold is there repre-

great favour with the king, and of great power in England, and therefore the likeliest man by his assistance to advance, or by his opposition to hinder, or temperate, the duke's expectation, there was a contract made between the duke and Harold in Normandy, in the Confessor's life-time; that Harold should, after the Confessor's death, assist the duke in obtaining the crown of England (a). Shortly after which, the Confessor died, and then stepped up the three competitors to the crown, viz.

1. Edgar Ætheling, who was indeed favoured by the nobility, but being an infant, was overborn by the power of Harold, who thereupon began to set up for himself. Whereupon Edgar, with his two sisters, fled into Scotland; where he, and one of his sisters, dying without issue, Margaret, his other sister and heir, married Malcolm, king of Scots; from whence proceeded the race of the Scottish kings (b).

2. Harold, who having at first raised a power under pretence of supporting and preserving duke William's title to this kingdom, and having by force suppressed Edgar, he thereupon claimed the crown to himself. And pretending an adoption, or bequest of the kingdom unto him, by the Confessor, he forgot his promise

presented as taking his departure from king Edward, in execution of some commission, and mounting his vessel with a great train. The design of redeeming his brother and nephew, who were hostages, is the most likely cause that can be assigned; and is accordingly mentioned by Eadmer, Hoveden, Brompton, and Simeon of Durham. For a farther account of this piece of tapestry, see *Histoire de l'Académie de Literature*, tom. ix. p. 535. HUMPH.

(a) W. Malsb. 93. Hoveden, 449. Brompton, 947. Gul. Gemet. l. 7. c. 31. H. Hunt. 366. Ingulf. 68. Wace, 459. 460. MS. penes Carte, 354.

(b) Though Edward had, with great affection, brought up Edgar, and had also bestowed on him the title of Ætheling, (from the Saxon Ædel—Ethel-Nobilis—All the royal family were called by the same name, as the king's sons, Seld. Tit. Hon. 498, 499. Al. Fortesc. 413. and in pure Saxon, it signifies any gentleman,) and seemed to mark him out as heir to the crown; yet he was not afterwards, perhaps, (as Hale supposes) *overborn by the power of Harold*. On the contrary, notwith-

standing this appearance of an adoption, as he was still under age when Edward died, he was not thought capable of taking the government, and therefore was not nominated by that monarch at his decease, to succeed to the kingdom. And the same objection prevailed with the great council, or Wittenagemote, to set him aside, and elect Harold. The excluding a minor from the succession in England, was not new to the Saxons. Ld. Lyt. Hist. Hen. II. 1 v. 3, 4. 349, 350. But see note (C), and Hall. View, c. 8. "Happy might it have been for England, (says Mr. Hallam) "if this exclusion of infants had always "obtained."

de to duke William, and usurped the crown; which he held : the space of nine months and four days. Hoveden (C).

3. William duke of Normandy, who pretended a promise of cession by the Confessor, and a capitulation or stipulation by rold for his assistance; and had, it seems, so far interested the e in favour of his pretensions, that he pronounced for William inst both the others (D).

(C) Harold's accession was attended with as little opposition as if he had succeeded by the most unquestionable title. The citizens of London, the bishops clergy, had adopted his cause; and all the most powerful nobility, connected b him by alliance or by friendship, willingly seconded his pretensions. The of Edgar Ætheling was scarce ever mentioned; much less the claim of the e of Normandy; and Harold, assembling the council, received the crown from r hands without waiting for any regular meeting of the states, or submitting question to their free choice or determination.* The new prince, founding title on the supposed suffrages of the people, which appeared unanimous, was, the day immediately succeeding Edward's death, crowned and anointed king, Aldred, archbishop of York. The whole nation seemed joyfully to swear giance to him.

The duke of Normandy, when he first received intelligence of Harold's sion, was moved to the highest pitch of indignation; but that he might give better colour to his pretensions, he sent over an embassy to England, upbraided Harold, with his breach of faith, and summoning him to resign immediately sion of the kingdom. Harold replied, that the oath with which he was oached, had been extorted by the well-grounded fear of violence, and could er, for that reason, be regarded as obligatory: That he had no commission, et from the late king, or from the states of England, who alone could dispose he crown, to make any tender of the succession to the duke of Normandy; if he, a private person, had assumed so much authority, and had even volun-ly sworn to support the duke's pretensions, the oath was unlawful, and it was duty to seize the first opportunity of breaking it: That he had obtained the en by the unanimous suffrages of the people; and should show himself totally orthy of their favour, did he not strenuously maintain those national liberties, a which they had entrusted him: and that the duke, if he made any attempt orce of arms, should experience the power of an united nation, conducted by rince, who, sensible of the obligations imposed on him by his royal dignity, determined, that the same moment should put a period to his life and to his ernment.† HUME.

(D) The most important ally, whom William gained by negotiation, was Pope, who had a powerful influence over the ancient barons, no less devout

G. Fict. 196. Ypod. Neust. 436. Or-
Vitalis, 492. M. West. 221. W. Malm:
Ingulf. 68. Brompton, 957, Knyghton,
9. H. Hunting. 210. Many of the his-
us say, that Harold was regularly elect-

ed by the states; some, that Edward left
him his successor by will.

† W. Malm. 99. Higden, 285. M. West.
222. De Gest. Angl. incerto auctore 331.

Hereupon the duke makes his claim to the crown of England; gathered a powerful army, and came over; and upon the 14th of October, anno 1067 (*a*), gave Harold battle, and overthrew him, at that place in Sussex, where William afterwards founded Battell-abbey, in memory of that victory (*b*). And then he took upon him the government of the kingdom, as king thereof; and upon Christmas following was solemnly crowned at Westminster by the archbishop of York (*c*): and he declared at his coronation,

(*a*) There is, I believe, a mistake in the year, for it seems agreed that William on the day of St. Michael, 1066 (and not 1067) landed at Pevensey, in Sussex. *Ld. Lyt. Hist. Hen. II. 1 v. oct. 25.*

(*b*) *Gul. Gemet. 288. Chron. Sax. 189. M. West. 226. M. Paris, 9. Diceto, 482.* This convent was freed by him from all episcopal jurisdiction. *Monast. Ang. tom. 1. p. 311, 312.*

(*c*) William pretending that Stigand, the primate, had obtained his pall in an irregular manner from pope Benedict

IX. who was himself an usurper, refused to be consecrated by him; and therefore conferred that honour on Aldred, archbishop of York. *Gul. Pictav. 206. Ingulf. 69. Malmes. 102. Hoveden, 450. M. West. 245. Flor. Wig. 635. M. Paris, 4. Anglia Sacra, vol. 1. p. 248. Alur. Bever. 127.* Stigand was possessed of such influence and authority over the English, as might be dangerous to a new established monarch. *Eadmer. 6. See Biog. Brit. 1 v. 128. tit. Aldred, ed. 1778. Ld. Lyt. Hist. Hen. II. 1 v. oct. 40.*

in their religious principles, than valorous in their military enterprises. The Roman pontiff, after an insensible progress during several ages of darkness and ignorance, began now to lift his head openly above all the Princes of Europe; to assume the office of a mediator, or even an arbiter, in the quarrels of the greatest monarchs; to interpose himself in all secular affairs, and to obtrude his dictates, as sovereign laws, on his obsequious disciples. It was a sufficient motive to Alexander II. the reigning pope, for embracing William's quarrel, that he alone had made an appeal to his tribunal, and rendered him umpire of the dispute between him and Harold; but there were other advantages which that pontiff foresaw must result from the conquest of England by the Norman arms. That kingdom, though at first converted by Romish missionaries, though it had afterwards advanced some farther steps towards subjection under Rome, maintained still a great independence in its ecclesiastical administration; and forming a world within itself, entirely separated from the rest of Europe, it had hitherto proved inaccessible to those exorbitant claims, which supported the grandeur of the papacy. Alexander therefore hoped, that the French and Norman Barons, if successful in their enterprise, might import into that country, a more devoted reverence to the holy see, and bring the English churches to a nearer conformity with those of the rest of Europe. He declared immediately in favour of William's claim; * pronounced Harold a perjured usurper; denounced excommunication against him and his adherents; and the more to encourage the duke of Normandy in his enterprize, he sent him a consecrated banner, and a ring with one of St. Peter's hairs in it. † Thus (adds Mr. Hume) were all the ambition, and violence of that invasion, covered over safely with the broad mantle of religion,

* *W. Malm. 100. Ingulf. 69. Higden, 285. Brompton, 956.* † *Baker, 22. edit. 1684.*

that he claimed the crown, not *jure belli*, but *jure successionis*. Brompton gives us this account thereof “ cum nomen tyranni “ exhorresceret & nomen legitimi principis induere vellet petiit “ consecrari;” and accordingly, says the same author, the archbishop of York, in respect of some present incapacity in the archbishop of Canterbury, “ munus hoc adimplevit ipsumque “ Gulielmum Regem ad jura Ecclesiæ Anglicanæ tuenda & con- “ fervanda populumque suum recte regendum, & Leges rectas “ statuendum sacramento solemniter adstrinxit;” (a) and there- upon he took the homage of the nobility (b).

This being the true, though short account of the state of that business, there necessarily follows from thence, these plain and unquestionable consequences.

First, that the conquest of king William I. was not a conquest upon the country, or people, but only upon the king of it, in the person of Harold, the usurper. For William I. came in upon a pretence of title of succession to the Confessor; and the prosecution, and success of the battle, he gave to Harold, was to make good his claim of succession, and to remove Harold, as an unlawful usurper, upon his right. Which right was now decided in his favour, and determined by that great trial by battle (c).

Secondly, that he acquired in consequence thereof, no greater right than what was in the Confessor, to whom he pretended a right of succession; and therefore, could no more alter the laws of the kingdom, upon the pretence of conquest, than the Confessor himself might; or than the duke himself could have done, had he been the true and rightful successor to the crown, in point of descent from the Confessor. Neither is it material, whether his pretence were true or false; or whether, if true, it were available or not, to entitle him to the crown. For whatsoever it was, it was sufficient to direct his claim, and to qualify his victory so, that the *jus belli* thereby acquired, could be only *victoria in regem, sed non in populum*: and put him only in the state, capacity and qualification of a successor to the king, and not as conqueror of the kingdom (d).

(a) Order. Vital. 503. Malmesb. 271.

(b) The King, thus possessed of the throne by a pretended destination of king Edward, and by an irregular election of the people, but still more by the power of his arms, retired from London to Barking in Essex; and there received

the submissions of all the nobility who had not attended his coronation. Gul. Pictav. 208. Order. Vitalis, 503.

(c) Seld. of Tithes, c. 8. Blac. Com. 1 v. 199.

(d) Though Sir Matthew Hale, and others, contend that the conquest by

Thirdly, and as this his antecedent claim, kept his conquest within the bounds of a successor, and restrained him from the unlimited bounds and power of a conqueror; so his subsequent coronation, and the oath by him taken, is a further unquestionable demonstration, that he was restrained within the bounds of a successor, and not enlarged with the latitude of a victor. For at his coronation, he bound himself by a solemn oath, to preserve the rights of the church, and to govern according to the laws; and not absolutely and unlimitedly, according to the will of a conqueror.

Fourthly, that if there were any doubt whether there might be such a victory, as might give a pretension to him of altering laws, or governing as a conqueror; yet to secure from that possible fear, and to avoid it, he ends his victory in a capitulation. Namely, he takes the ancient oath of a king, unto the people; and the people reciprocally, giving or returning him that assurance, that subjects ought to give their prince, by performing their homage to him as their king, declared him, by the victory he had obtained over the usurper, to be the successor of the Confessor (a). Consequently, if there might be any pretence of conquest over the people's rights, as well as over Harold's, yet the capitulation, or stipulation, removes the claim or pretence of a conqueror, and enstates him in the regulated capacity and state of a successor. And upon all this it is evident, that king William I. could not abrogate, or alter the ancient laws of the kingdom, any more than if he had succeeded the Confessor as his lawful heir, and had acquired the crown by the peaceable course of descent, without any sword drawn (E).

William can be considered in no other light than an acquisition, without any of the powers attendant on subjugation, yet others, particularly Wilkins and Dr. Brady, understand it to have been

no less than an absolute conquest. See note (E) on this chapter.

(a) See *Ld. Lyt. Hist. Hen. II. 1 v. oct. 40.* and the authorities there cited. Also *Biog. Brit. 1 v. 128. ed. 1778. tit. Aldred.*

(E) Some have been desirous of refusing to William, the title of conqueror, in the sense in which it is commonly understood; and on pretence, that the word is sometimes, in old books, applied to such as make an acquisition of territory, by any means, they are willing to reject William's title by right of war, to the crown of England. It is needless to enter into a controversy, which by the terms of it must necessarily degenerate into a dispute of words. It suffices to say, that the Duke of Normandy's first invasion of the island was hostile; that his subsequent administration was entirely supported by arms; that in the very frame of his laws,

And thus much may suffice, to show that king William I. did not enter by such a right of conquest, as did or could alter the laws of this kingdom.

he made a distinction between the Normans and English, to the advantage of the former;* that he acted in every thing as absolute master over the natives, whose interests and affections he totally disregarded; and that if there was an interval when he assumed the appearance of a legal magistrate, the period was very short, and was nothing but a temporary sacrifice, which he, as has been the case with most conquerors, was obliged to make of his inclination to his present policy. Scarce any of those revolutions, which both in history and in common language have always been denominated conquests, appear equally violent, or have been attended with so sudden an alteration, both of power and property. The Roman state, which spread its dominion over Europe, left the rights of individuals in a great measure untouched; and those civilized conquerors, while they made their own country the seat of empire, found, that they could draw most advantage from the subject provinces, by bestowing on the natives the free enjoyment of their own laws, and of their private possessions. The barbarians who subdued the Roman empire, though they settled in the conquered countries, yet being accustomed to a rude, uncultivated life, found a small part of the land sufficient to supply all their wants; and they were not tempted to seize extensive possessions, which they neither knew how to cultivate nor employ. But the Normans and other foreigners who followed the standard of William, while they made the vanquished kingdom the seat of empire, were yet so far advanced in arts, as to be acquainted with the advantages of a large property; and having totally subdued the natives, they pushed the rights of conquest (very extensive in the eyes of avarice and ambition, however narrow in those of reason) to the utmost extremity against them. Except the former conquest of England by the Saxons themselves, who were induced by peculiar circumstances, to proceed even to the extermination of the natives, it would be difficult to find in all history, a revolution more destructive, or attended with a more complete subjection of the ancient inhabitants. Contumely seems even to have been wantonly added to oppression;† and the natives were universally reduced to such a state of meanness and poverty, that the English name became a term of reproach; and several generations elapsed, before one family of Saxon pedigree, was raised to any considerable honours, or could so much as attain the rank of barons of the realm.‡ These facts are so apparent from the whole tenor of the English history, that none would have been tempted to deny or elude them, were they not heated by the controversies of faction; while one party were absurdly afraid of these absurd consequences, which they saw the other party inclined to draw from this event. But it is evident, that the present rights and privileges of the people, who are a mixture of English and Normans, can never be affected by a transaction which passed more than seven hundred years ago;

* Hoveden, p. 600.

† H. Hunt. p. 370. Brompton, p. 980.

‡ So late as the reign of king Stephen, the earl of Albemarle, before the battle of the standard, addressed the officers of the army

in these terms: *Proceres Angliæ clarissimi, et genere Normanni*, &c. Brompton, p. 1026. See farther Abbas Rieval, p. 339, &c. All the barons and military men of England still called themselves Normans.

Therefore I come to the last question I proposed to be considered, viz. whether *de facto* there was any thing done by king William I. after his accession to the crown, in reference either to the alteration or confirmation of the laws; and how and in what manner the same was done.

This, being a narrative of matters of fact, I shall divide into two inquiries; viz. first, what was done in relation to the lands and possessions of the English; and secondly, what was done in relation to the laws of the kingdom in general. For both of these will be necessary, to make up a clear narrative, touching the alteration or suspension, confirmation or execution, of the laws of this kingdom by him.

First, therefore, touching the former, viz. what was done in relation to the lands and possessions of the English.

These two things must be premised, viz. first, a matter of right, or law; which is this, that in case this had been a conquest upon the kingdom, it had been at the pleasure of the conqueror to have taken all the lands of the kingdom into his own possession;—to have put a period to all former titles;—to have cancelled all former grants;—and to have given, as it were, the date and original to every man's claim, so as to have been no higher nor ancients than such his conquest, and to hold the same by a title derived wholly from and under him. I do not say, that every absolute conqueror of a kingdom, will do thus; but that he may,

and as all ancient authors,* who lived nearest the time, and best knew the state of the country, unanimously speak of the Norman dominion as a conquest by war and arms, no reasonable man, from the fear of imaginary consequences, will ever be tempted to reject their concurring and undoubted testimony. HUME.—And see Hallam's View of Mid. Ag. c. 8. part 2.

* Ingulf. p. 70. H. Hunt. p. 370, 372. M. West. p. 225. Gul. Neab. p. 357. Alured. Beverl. p. 124. De Gest. Angl. p. 333. M. Paris, p. 4. Sim. Dun. p. 206. Brompton, p. 962. 980. 1161. Gervase Tilb. lib. 1. cap. 16. Textus Roffensis apud Seld. Spicileg. ad Eadm. p. 197. Gul. Pict. p. 206. Ordericus Vitalis, p. 521. 666. 853. Epist. St. Thom. p. 801. Gul. Malmesb. p. 52. 57. Knyghton, p. 2354. Eadmer. p. 110. Thom. Rudborne in Ang. Sacra, vol. I. p. 248. Monarch. Roff. in Anglia Sacra, vol. II. p. 276. Girald. Cambr. in eadem, vol. II. p. 413. Hist. Elyensis, p. 516. The words of this last historian, who is very ancient, are remarkable, and worth

transcribing. "Rex itaque factus Willielmus, quid in principes Anglorum, qui tantæ cladi superesse poterant, fecerit, dicere, cum nihil prosit, omitto. Quid enim prodesset, si nec unum in toto regno de illis dicerem pristine potestate uti permissum, sed omnes aut in gravem paupertatis ærumnam detrosos aut ex hæreditatis patria pulsos, aut effosis oculis, vel cæteris amputatis membris, opprobrium hominum factos, aut certa miserrime affictos, vita privatos. Simili modo utilitate carere existimo dicere quid in minorem populum, non solum ab eo, sed a suis actum sit, cum id dictu sciamus difficile, et ob immensam crudelitatem fortassî incredibili.

if he will, and has power to effect it. Secondly, the second thing to be premised is, a matter of fact, which is this: that duke William brought in with him a great army of foreigners, that expected a reward of their undertaking; and therefore were doubtless very craving and importunate for gratifications to be made them by the conqueror (a). Again, it is very probable, that of the English themselves, there were persons of very various conditions and inclinations: some perchance did adhere to the duke, and were assistant to him openly, or at least under-hand, towards the bringing him in; and those were sure to enjoy their possessions privately and quietly, when the duke prevailed. Again, some did, without all question, adhere to Harold; and those in all probability were severely dealt with, and dispossessed of their lands, unless they could make their peace. Again, possibly they were others who assisted Harold; partly out of fear and compulsion; yet those, possibly, if they were of any note or eminence, fared little better than the rest. Again, there were some that probably stood neuter, and meddled not; and those, though they could not expect much favour, yet they might in justice expect to enjoy their own. Again, it must needs be supposed, that the duke having so great an army of foreigners;—so many ambitious and covetous minds to be satisfied; so many to be rewarded in point of gratitude; and after so great a concussion, as always happens upon the event of a victory, it must needs, upon those and such like accounts, be evident to any man that considers things of this nature, that there were great outrages and oppressions committed by the victor's soldiers and their officers;—many false accusations made against innocent persons;—great disturbances and evictions of possessions; many right owners being unjustly thrown out, and consequently many occupations and usurpations of other men's rights and possessions;—and a long while before those things could be reduced to any quiet and regular settlement (F).

(F) Though the early confiscation of Harold's followers might seem iniquitous, being extended towards men who had never sworn fidelity to the duke of Normandy; who were ignorant of his pretensions, and who only fought in

(a) William bestowed the forfeited estates on the most powerful of his captains, and established funds for the payment of his soldiers. Gul. Pict. 208.—His military institutions were those of a tyrant; at least of one, who reserved to himself, whenever he pleased, the

power of assuming that character. H. Hunt. 369. M. West. 225. Malmsh. 104. His best measures were the establishment of public peace.—He permitted, (says Mr Hallam,) no rapine but his own.—View of Mid. Ag. c. 8. part 2.

These general observations being premised, we will now see what *de facto*, was done in relation to men's possessions, in consequence of this victory of the duke.

First, it is certain that he took into his hands all the *demesne* lands of the crown, which were belonging to Edward the Confessor; at the time of his death; and avoided all the dispositions and grants thereof made by Harold, during his short reign. And this might be one great end of his making that noble survey, in the fourth year of his reign, called generally, *Doomsday-read*, in some records; as Rot. Winton, &c.—thereby to ascertain what were the possessions of the crown in the time of the Confessor: and those he entirely resumed. And this is the reason why in some of our old books it is said, *ANCIENT DEMESNE* is that which was

defence of the government, which they themselves had established in their own country; yet were these rigours, however contrary to the ancient Saxon laws, excused on account of the urgent necessities of the prince. The successive destruction of families, was a convincing proof that the king intended to rely entirely on the support and affections of foreigners; and new forfeitures, attainders, and violences were the necessary result of this destructive plan of administration. No Englishman possessed his confidence, or was intrusted with any command or authority; and strangers, whom a rigorous discipline could have but ill contained, were encouraged in every act of insolence and tyranny against them. The easy submission of the kingdom on its first invasion, had exposed the natives to contempt; the subsequent proofs of their animosity and resentment had made them the object of hatred; and they were soon deprived of every expedient by which they could hope to make themselves either regarded or beloved by their sovereign. Impressed with the sense of this dismal situation, many Englishmen fled into foreign countries, with an intention of passing their lives abroad free from oppression, or of returning on a favourable opportunity to assist their friends in the recovery of their native liberties*. It was crime sufficient, in an Englishman, to be opulent, noble, or powerful; and the policy of the king concurring with the rapacity of his foreign adventurers, produced almost a total revolution in the landed property of the kingdom. Ancient and honourable families were reduced to beggary; the nobles themselves were every where treated with ignominy and contempt; they had the mortification of seeing their castles and manors possessed by Normans of the meanest birth, and of the lowest station†, and they found themselves carefully excluded from every road, which led either to riches or preferment‡. HUME.

* Order. Vital. 508. M. West. 225. M. Paris, 4. Sim. Dun. 197.

† Order. Vitalis. 521. M. West. 229.

‡ The obliging all the inhabitants to put out their fires and lights at certain hours, upon the sounding of a bell, called the *cour-fes*, is represented by Polydore Virgil, lib. 9,

as a mark of the servitude of the English. But this was a law of police, which William had previously established in Normandy. See Du Moulin, Hist. de Normandie, 160. The same law had place in Scotland. Le Burgor, cap. 86.

held by king William the Conqueror; and in others 'tis said, ancient demesne is that which was held by king Edward the Confessor. And both true in their kind, in this respect; viz. that whatsoever appeared to be the Confessor's at the time of his death, was assumed by king William into his own possession (G).

(G) Those lands which were in the possession of Edward the Confessor, and which afterwards came to William the Conqueror, and were by him set down in a book called DOMESDAY, under the title *De Terra Regis*, are ANCIENT DEMESNE LANDS. They were exempt from any feudal servitude, and were let out to husbandmen, to cultivate for the purpose of supplying the king's household and family, with provisions and necessaries. For this purpose the tenants (who are called by Bracton, *villani privilegiati*) enjoyed certain privileges, and the tenure itself had several properties distinct from others, which it retains to this day; though the lands be in the hands of a subject, and the services changed from labour to money. 2 Inst. 542. 4 Inst. 269. F. N. B. 14. Salk. 57. pl. 2. Black. Com. 2 v. 99. But the lands which were in the possession of Edward the Confessor, and which were given away by him, are not at this day ancient demesne; nor are any others, except those which are written down in the book of DOMESDAY; and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. Salk. 57. 4 Inst. 269. Hob. 183. Brownl. 43. The book of DOMESDAY was brought into court by a certiorari out of chancery, directed to the treasurer and chamberlain of the exchequer, and by mittimus sent into the common pleas. Dy. 150. b. Issue was taken "whether Longhope in the county of Gloucester was ancient demesne or not;" on producing the book of DOMESDAY, it appeared that Hope was ancient demesne, but nothing said of Longhope; and the Court held, that the party failed in his proof. Lev. 106. Sid. 147. But if the question be, "whether lands be parcel of a manor which is ancient demesne?" this shall be tried by a jury. Salk. 56. pl. 1. 2 Salk. 174. But see Burr. 1048. where an acre of land may be ancient demesne, though the manor, of which it is parcel, is not so. Vide Rol. Abr. 321. and see F. N. B. 14. Leon. 232. Dyer, 8. 11 Co. 10. Bro. Ancient Dem. 15. 2 Leon. 191. 3 Lev. 405. Lands which are next, or most convenient to the lord's mansion-house, and which he keeps in his own hands, for the support of his family, and for hospitality, are called his demesnes, but have not the same properties with ancient demesne. Spelm. 12. Blackstone, in treating of the rents and profits of the demesne lands of the crown, as being a branch of the king's ordinary revenue, says, "these demesne lands, *terre dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprizing divers manors, honours, and lordships; the tenants of which had very peculiar privileges. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and, particularly, after king William III. had greatly impoverished the crown, an act passed, (1 Ann. st. 1. c. 7.) whereby all future grants or leases from the crown, for any

Secondly, it is also certain, that no person simply, and *quatenus* an English man, was dispossessed of any of his possessions;

longer term than thirty-one years, or three lives, are declared to be void; except with regard to houses, which may be granted for fifty years. And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of three lives, or thirty-one years: that is, where there is a subsisting lease of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one third of the clear yearly value. The misfortune is, that this act was made too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases; but may be of benefit to posterity, when those leases expire." Blac. Com. 1 v. 286. As to the tenure, lord Holt, said it was as ancient as any other, though he supposes that the privileges annexed to it, commenced by some act of parliament; for that it cannot be created by grant at this day. Salk. 57. Mr. Justice Blackstone, in treating of this tenure, describes it thus: "There is a species of tenure described by Bracton under the name sometimes of privileged villenage, and sometimes of villen socage. This he tells us, l. 4. tr. 1. c. 28, is such as has been held of the kings of England from the Conquest downwards; that the tenants herein *villani faciant servitia, sed certa et determinata*; that they cannot alienate or transfer their tenements by grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes, is no other than an exalted species of copyhold, subsisting at this day, viz. the tenure in ancient demesne; to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *VILLANUM SOCAGIUM*. The tenants of ancient demesne lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies, c. 66. continued for a long time pure and absolute villeins, dependent on the will of the lord; and those who have succeeded them in their tenures, now differ from common copyholders in only a few points. F. N. B. 228. Others were in great measure enfranchised by the royal favour, being only bound in respect of their lands to perform some of the better sort of villen services, but those *DETERMINATE* and *CERTAIN*; as, to plough the king's land, to supply his court, with provisions, and the like; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them; 4 Inst. 269; as, to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process, denominated a writ of right close; F. N. B. 11. Not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries, and the like. See 1 New Abr. 411. These tenants therefore, though their tenure be absolutely copyhold, yet have an interest equivalent to a freehold: for, though their services were of a base and villenous original, (Gilb. Hist. Exch. 16. 80.) yet the tenants were esteemed, in all other respects, to be highly privileged villeins; and espe-

consequently their land was not pretended unto, as acquired *jura belli*. Which appears most plainly from the following evidences, viz.

First, that very many of those persons that were possessed of lands in the time of Edward the Confessor, and so returned upon the book of Domesday, retained the same unto them and their descendants; and some of their descendants retain the same possessions to this day; which could not have been, if presently, *jura belli ac victoriae universalis*, the lands of the English had been vested in the conqueror. And again,

Secondly, we do find, that in all times, even suddenly after the conquest, the charters of the ancient Saxon kings WERE PLEADED AND ALLOWED; and titles made and created by them, to lands, liberties, franchises, and regalities, affirmed and adjudged under William I. Yea, when that exception was offered, THAT

cially in this, THAT THEIR SERVICES WERE FIXED AND DETERMINATE, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*, says Bracton, *distincuntur liberi*." Britton also, from such their freedom, calls them absolutely *SOKEMANS*, and their tenure *SOKEMANRIES*; which he describes (c. 66.) to be lands and tenements which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being as it were lands enfranchised by the king or his predecessors, from their ancient demesne. And the same name is also given them in Fleta, l. 1. c. 8. Hence Fitzherbert observes, (N. B. 13.) that no lands are ancient demesne, but lands holden in socage: that is, not in free and common socage, but in this amphibious, subordinate class, of villein socage. And it is possible, that as this species of socage tenure is plainly founded upon *predial* services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free socage or socage of frank tenure, and villein socage or socage of ancient demesne.—Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of 12 Cha. 2. c. 24. Yet they differ from common copyholds, principally in the privileges before mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day, viz. that they cannot be conveyed from man to man, by the general common-law conveyances of feoffment, and the rest; but must pass by surrender, to the lord or his steward, in the manner of common copyholds: yet with this difference, (Kitch. on Courts 194.) that, in the surrender of these lands in ancient demesne, it is not used to say, "to hold at the will of the lord," in their copies, but only, "to hold according to the custom of the manor." Black. Com. 2 v. 101. How ancient demesne may become frank-fee, and where it may be pleaded, and the form, vide 1 New Abr. 112, 113. and the authorities there cited.

BY THE CONQUEST THOSE CHARTERS HAD LOST THEIR FORCE, yet those claims were allowed. As in 7 E. 3. *finis*, mentioned by Mr. Selden, in his notes upon Eadmerus; which could not be, if there had been such a conquest as had vested all men's rights in the conqueror.

Thirdly, many recoveries were had shortly after this conquest, as well by heirs as successors, of the seisin of their predecessors before the conquest. We shall take one or two instances for all; namely, that famous record *apud Pinendon* (a), by the archbishop of Canterbury, in the time of king William I. of the seisin and title of his predecessors before the conquest. See the whole process and proceedings thereupon, in the end of Mr. Selden's notes upon Eadmerus, and Spelman's Glossary, title *Drenghe*. Upon these instances, and much more that might be added, it is without contradiction, that the rights and inheritances of the English, *quia tales*, were not abrogated or impeached by this conquest; but continued, notwithstanding, the same. For, as is before observed, it was *jure belli quoad regem, sed non quoad populum*.

But to descend to some particulars. The English persons that the Conqueror had to deal with were of three kinds, viz.

First, such as adhered to him against Harold the usurper; and, without all question, those continued the possession of their lands; and their possessions were rather increased by him, than any way diminished.

Secondly, such as adhered to Harold, and opposed the duke, and fought against him; and doubtless, as to those, the duke after his victory used his power, and dispossessed them of their estates; which is usual upon all conclusions and events of this kind, upon a double reason: first to secure himself against the power of those that opposed him, and to weaken them in their estates, that they should not afterwards be enabled to make head against him: and, secondly, to gratify those that assisted him, and to reward their services in that expedition; and to make them firm to his interest, which was now twisted with their own. For it can't be imagined, but that the Conqueror was assisted with a great company of foreigners—some that he favoured—some that had highly deserved for their valour—some that were necessitous soldiers of fortune—and others that were either ambitious or covetous; all whose desires, deserts, or expectations, the Con-

(a) Post 118. 120.

queror had no other means to satisfy, but by the estates of such as had appeared open enemies to him; and doubtless, many innocent persons suffered in this kind, under false suggestions and accusations; which occasioned great exclamations by the writers of those times, against the violences and oppressions which were used after this victory.

And, thirdly, such as stood neuter, and meddled not on either side during the controversy. And doubtless, for some time after this great change, many of those suffered very much, and were hardly used in their estates, especially such as were of the more eminent sort (a).

Gervasius Tilburiensis, who wrote in the time of Henry II. in his cap. *Quid Murdrum & Quare sic Dictum*, gives us a large account of what he had traditionally learned touching this matter, to this effect, viz. "Post regni conquisitionem & perduellium subjectionem, &c. nomine autem successionis a temporibus subacta gentis nihil sibi vendicarent, &c." i.e. after the conquest of the kingdom, and subjection of the rebels, when the king himself and his great men had surveyed their new acquisitions, strict enquiry was made, who they were that, fighting against the king, had saved themselves by flight. From these and the heirs of such as were slain in battle, fighting against him, all hopes of succession, or of possessing their estates, were lost; for the people being subdued, they held their lives [and property] as a favour.

But Gervase, as he speaks so liberally in relation to the conquest, and the *subacta gens*, as he terms us; so it should seem he was, in great measure, mistaken in this relation. For it is most plain, that those that were not visibly engaged in the assistance of Harold, were not, according to the rules of those times, disabled to enjoy their possessions, or make title of succession to their ancestors, or transmit to their posterity as formerly; though possibly some oppressions might be used to particular persons, here and there, to the contrary. And this appears by that excellent monument of antiquity, set down in sir H. Spelman's Glossary, in the title of *Drenches* or *Drenges*, which I shall here transcribe, viz.

"Edwinus de Sharborne, et quidam alii qui ejecti fuerunt & terris suis abierunt ad conquestorem & dixerunt ei, quod nunquam ante conquestum, nec in conquestum, nec post, fuerunt contra

(a) Vide note (F) on this chapter.

" *regem ipsum in CONCILIO AUT IN AUXILIO sed tenuerunt se in pace*, et hoc parati sunt probare qualiter rex vellet ordinare, per quod idem rex facit inquiri per totam Angliam si ita fuit, quod quidem probatum fuit, propter quod idem rex præcepit ut omnes illi qui sic tenuerunt se in pace in forma prædicta quod ipsi REHABERENT omnes terras & dominationes suas adeo intègre & in pace ut unquam habuerent vel tenuerunt ante conquestum suum, et quod ipsi in posterum vocarentur *Drenge*."

But it seems the possessions of the church were not under this discrimination, for they being held not in right of the person, but of the Church, were not subject to any confiscation by the adherence of the possessor to Harold the usurper (a). And therefore, though it seems Stigand archbishop of Canterbury, at the coming in of William I. had been in some opposition against him, which probably might be the true cause why he performed not the office of his coronation, which of right belonged to him, though some other impediments were pretended (b), and might also possibly be the reason why a considerable part of his possessions were granted to Odo, bishop of Bayeux; yet they were afterwards recovered by Lanfranc, his successor, at Pinendon, *in pleno comitatu, ubi rex præcepit totum comitatum absque mora considerare, & homines comitatus omnes francigenos & præcipue Anglos in antiquis legibus & consuetudinibus peritos in unum conuenire.*" (c)

To this may be added those several grants and charters made by king William I. mentioned in the History of Ely, and in Eadmerus, for restoring to bishopricks and abbies such lands, or goods, as had been taken away from them, viz.

" *Willielmus Dei gratia rex Anglorum, Lanfranco archiepiscopo Cantuar' & Galfrido episcopo Constantien. & Roberto comiti de Ou & Richardo filio comitis Gilberti & Hugoni de Monteforti suisque aliis proceribus regni Angliæ salutem. Summonete vicecomites meos ex meo præcepto & ex parte mea*

(a) William, however, retained the church in great subjection, as well as his lay subjects: and would allow none, of whatever character, to dispute his sovereign will and pleasure.

(b) The crimes alleged against Stigand were mere pretences; his ruin was not only resolved on, but prosecuted with great severity. Hoveden, 453. Diceto, 482. Knyghton, 2545.

Anglia Sacra, 1 v. 5, 6. Ypod. Neust. 438. Eadmerus in initio libri.

(c) This County Court was held 6 W. 1. A. D. 1072. before the Freeman of the County of Kent, in the presence of many chief men—Bishops, Lords, and Lawyers. It lasted three days; and the judgment for the Archbishop was afterwards confirmed *totius regni assensu*.—post 120.

" eis dicite ut reddant episcopatibus meis & abbatibus totum domi-
 " nium omnesque dominicas terras quas de dominio episcopatum
 " meorum, & abbatium, episcopi mei & abbates eis vel lenitate
 " timore vel cupiditate dederunt vel habere consenserunt vel ipsi
 " violentia sua inde abstraxerunt, & quod hactenus injuste possi-
 " derunt de dominio ecclesiarum mearum. Et nisi reddiderint
 " sicut eos ex parte mea summonebitis, vos ipsos velint nolint,
 " constringite reddere; et quod si quilibet alius vel aliquis ves-
 " trum quibus hanc justitiam imposui ejusdem querelæ fuerit
 " reddat similiter quod de domino episcopatum vel abbatium
 " mearum habuit ne propter illud quod inde aliquis vestrum
 " habebit, minus exerceat super meos vicecomites vel alios, qui-
 " cunque teneant dominium ecclesiarum mearum, quod præci-
 " pio, &c."

" Willielmus rex Anglor' omnibus suis fidelibus suis & vice-
 " comitibus in quorum vicecomitatibus abbatia de Heli terras
 " habet salutem. Præcipio ut abbatia præd. habeat omnes con-
 " suetudines suas scilicet saccham & socham toll & team &
 " infanganetheof, hamsocua, & grithbrice fithwite & ferdwite
 " infra burgum & extra & omnes alias forisfacturas in terra qua
 " super suos homines sicut habuit die qua rex Edwardus fuit
 " vivus & mortuus, & sicut mea jussione dirationatæ apud Kene-
 " teford per plures scyras ante meos barones, viz. Galfridum
 " Constantien. ep. & Baldewine abbatem, &c. Teste Rogere
 " Bigot." (a)

" Willielmus rex Angl. Lanfranco archiepo', & Rogero comiti
 " Moritonie, & Galfrido Constantien. ep. salutem. Mando vobis
 " & præcipio ut iterum faciatis congregari omnes scyras quæ
 " interfuerunt placito habito de terris ecclesiæ de Heli, antequam
 " mea conjux in Normaniam novissime veniret, cum quibus
 " etiam sint de baronibus meis qui competenter adesse poterint &
 " prædicto placito interfuerint & qui terras ejusdem ecclesiæ
 " tenent; quibus in unum congregatis eligantur plures de illis
 " Anglis qui sciunt quomodo terræ jacebant præfatæ ecclesiæ die
 " qua rex Edwardus obiit, & quod inde dixerint ibidem jurejurando
 " testentur; quo facto restituentur ecclesiæ terræ quæ in domi-
 " nio suo erant die obitus regis Edwardi; exceptis his quas
 " homines clamabant me sibi dedisse; illas vero literis mihi signi-
 " ficate quæ sint, & qui eas tenent; qui autem tenent thainlandes
 " quæ proculdubio debent teneri de ecclesia faciant concordiam

(a) Camd. Rem. 102.

"cum abbate quam meliorem poterint, & si noluerint terra remaneant ad ecclesiam, hoc quoque detinentibus socham & sabcham fiat," &c.

"Willielmus rex Anglorum, Lanfranco archiepiscopo, & Gislebertus episcopus & R. comiti M. salutem, &c. Defendite ne Remigius episcopus novas consuetudines requirat infra insulam de Heli; nolo enim quod ibi habeat nisi illud quod antecessor ejus habebat tempore regis Edwardi scilicet qua die ipse rex mortuus est. Et si Remigius episcopus inde placitare voluerit placitet inde sicut fecisset tempore regis Edw. & placitum istum sit in vestra presentia; de custodia de Norguic. abbatem Simeonem qui etiam esse demittite; sed ibi munitionem suam conduci faciat ut custodiri. Facite remanere placitum de terris quas calumniantur Willielmus de Ou, & Radulphus filius Gualeranni, & Robertus Gernon; si inde placitare noluerint sicut inde placitabunt tempore regis Edwardi, & sicut in eodem tempore abbatia consuetudines suas habebat, volo ut eas omnino faciatis habere sicut abbas per chartas suas & per testes suos eas deplacitare poterit."

I might add many more charters to the foregoing, and more especially those famous charters in Spelman's Councils, vol. ii. fol. 148 & 165, whereby it appears, that king William I.—"communi concilio, & concilio archiepiscoporum episcoporum & abbatum, & omnium principum & baronum regni,"—instituted the courts for holding pleas of ecclesiastic causes, to be separate and distinct from those courts that had jurisdiction of civil causes (a). *Sed de his plusquam satis* (H).

(a) See Bac. on Seld. 17. 41. 77, 78. Ead. p. 6. l. 24. 4 Inst. 259. Wilk. Gilb. on Ten. 42, 43, 44. Madd. form. LL. Angl. Sax. 292. and Blac. Com. No. xx. fol. 141. 2 Inst. 70. Seld. in 3 v. 63.

(H) The county court in the Anglo-Saxon times, and even during some part of the reign of William I. was a court of great power and dignity, in which the bishop of the diocese sat with the earl, and on which all the abbots, priors, barons, knights, and freeholders of the county were obliged to attend. Here all the controversies arising in the county, the most important not excepted, were determined; though not always finally, because there lay an appeal from its decrees to a higher court. In a county court of Kent, held in the reign of William I. at Pinendine, and of which Hale makes mention (ante 116. 118.), there were present one archbishop, three bishops, the earl of the county, the vice-earl or sheriff, a great number of the king's barons, besides a still greater multitude of knights and freeholders, who in the course of three days adjudged several manors to belong to the archbishop of Canterbury, which had been

And thus I conclude the point I first propounded, viz. how king William I. after his victory, dealt with the possessions of the English. Whereby it appears that there was no pretence of an universal conquest, or that he was a victor *in populum*. Neither did he claim the title of English lands upon that account, but only made use of his victory thus far, to seize the lands of such as had opposed him; which is universal in all cases of victories, though without the pretence of conquest.

Secondly, therefore I come to the second general question, viz. what was done in relation to the laws.

It is very plain, that the king, after his victory, did, as all wise princes would have done, endeavour to make a stricter union

possessed for some time by Odo, bishop of Baieux, the king's uterine brother, and by other powerful barons *.

But the county courts did not continue long after the conquest in this state of power and splendour. For William I. about A.D. 1085, separated the ecclesiastical from the civil part of these courts; prohibiting the bishops to sit as judges, the clergy to attend as suitors, and the causes of the Church to be tried but in courts of their own †. By this regulation, which is said to have been made in a common council of the archbishops, bishops, abbots, and chief men of the kingdom, the county courts were deprived of their most venerable judges, their most respectable suitors, and most important business. Besides this, after the departure of the bishops and clergy, the earls disdained to sit as judges, and the great barons to attend as suitors, in the county courts; which, by degrees, reduced them to their present state. This was not the worst effect of this most imprudent and pernicious regulation. For by it the kingdom was split asunder; the crown and mitre were set at variance; and the ecclesiastical courts, by putting themselves under the immediate protection of the Pope, formed the clergy into a separate state, under a foreign sovereign, which in the end was productive of infinite disorders.

The ecclesiastical courts, which were immediately erected in consequence, were 1. The Archdeacon's Court. For as the archdeacon was discharged from sitting as a judge, with the hundredary, in the hundred court, he was authorized to erect a court of his own, in which he took cognizance of ecclesiastical causes within his archdeaconry. 2. The Bishop's Court, or Consistory, which received appeals from the archdeacon's court, and whose jurisdiction extended over the whole diocese. 3. The Archbishop's Court, which received appeals from the consistories of the several bishops of the province, and had jurisdiction not only over the particular diocese of the archbishop, but over all the dioceses in the province. From this highest ecclesiastical court, appeals lay to the Pope, which soon became frequent, vexatious, and expensive ‡.

* Dagdale Originales Jurid. 30. Hickesii Dissertat. Epistolaria, 31, &c. Hall View, c. 8. in which is a literal translation of a very ancient Saxon instrument, record-

ing a suit in a County Court, in Herefordshire, under the reign of Canute.

† Wilkins Concilia, l. 1. p. 368, 369.

‡ Id. Ibid. Hen. Hist. 3 v. 339.

between England and Normandy. In order thereunto, he endeavoured to bring in the French instead of the Saxon language, then used in England. "Deliberavit," says Holcot, "quomodo linguam Saxoniam possit destruere, & Anglicam & Normanicam idiomate concordare; & ideo ordinavit quod nullus in curia regis placitaret NISI IN LINGUA GALLICA," &c. (a). From whence arose the practice of pleading in our courts of law in the Norman or French tongue, which custom continued till the statute of 36 E. 3. c. 15.

And as he thus endeavoured to make a community in their language, so possibly he might endeavour to make the like in their laws, and to introduce the Norman laws into England, or as many of them as he thought convenient. And it is very probable, that after the victory, the Norman nobility and soldiers were scattered through the whole kingdom, and mingled with the English; which might possibly introduce some of the Norman laws and customs insensibly into this kingdom. And to that end the Conqueror did industriously mingle the English and Normans together, shuffling the Normans into English possessions here, and putting the English into possessions in Normandy, and making marriages among them, especially between the nobility of both nations (b).

This gave the English a suspicion, that they should suddenly have a change of their laws before they were aware of it. But it

(a) Probably the customs of England were originally recorded in Saxon. William declared his conquest by a change of laws and language. He had entertained the difficult project of totally abolishing the English language; and, for that purpose, he ordered that in all schools throughout the kingdom, the youth should be instructed in the French tongue; a practice which was continued from custom, till after the reign of Edward III. and was never indeed totally discontinued in England. The pleadings in the supreme courts of judicature were in French. 36 Ed. 3. c. 15. Seld. Spicileg. ad Eadmer. 139. 195. Fort. Laud. Leg. Angl. c. 48. The deeds were often drawn in the same language; the laws were composed in that idiom. Ingulf. 71. 88. Chron. Rothom. A. D. 1066.—No other tongue was used at court. It became the language of all fashionable

societies, and the English themselves, ashamed of their own country, affected to excel in that foreign dialect. Most of the English games and plays, were from the French. From this attention of William, and from the great foreign dominions long annexed to the crown of England, proceeded that great mixture of French which is at present to be found in the English tongue, and which composes the greatest, and perhaps the best part of our language. Hen. Hist. 3 v. 354. Hallam's View, vol. 2. c. 9. The common people however used their old language, and many charters were confirmed, in Saxon by Will. 1. and his son H. 1. and all acts of parliament, were made both in Latin and Norman or French.

(b) And yet instead of the English speaking Norman, the Normans began in this very reign to use the English tongue. Temp. Hist. 241.

fall out much better. For first, there arising some danger of a defection of the English, countenanced by the archbishop of York, in the north, and Frederick, abbot of St. Alban's, in the south; the king, by the persuasions of Lanfranc, archbishop of Canterbury,—“pro bono pacis apud Berkhamstead juravit super animas reliquias sancti Albani tactisque sacrosanctis evangelis (ministrante juramento abbate Frederico) ut bonas & approbatas antiquas regni leges quas sancti & pii Angliæ reges ejus antecessores, & maxime rex Edvardus statuit INVIOLABILITER OBSERVARE; et sic pacificati ad propria læti recesserunt.” *Vide MAT. PARIS in vita Frederici Abbatis sancti Albani.*

But although now, upon this capitulation, the ancient English laws were confirmed, and namely, the laws of St. Edward the Confessor; yet it appeared not what those laws were; and therefore, in the fourth year of his reign, we are told by Hoveden (a), in a digression he makes in his History under the reign of king Henry II. and also in the Chronicle of Litchfield—“Willielmus rex anno quarto regni sui consilio baronum suorum fecit summonari per universos consulatos Angliæ Anglos nobiles & sapientes & sua lege eruditos (b) ut eorum jura & consuetudines ab ipsis audiret, electis igitur de singulis totius patriæ comitatibus viri duodecim jurejurando confirmaverunt ut quoad possint recto tramite neque ad dextram neque ad sinistram partem divertentes legum suarum consuetudinem & sancitam patefacerent nihil prætermittentes nihil addentes, nihil prævaricando mutantes,” &c. and then sets down many of those ancient laws approved and confirmed by the king, and COMMUNE CONCILIUM. Wherein it appears, that he seems to be most pleased with those laws that came under the title of LEX DANICA, as most consonant to the Norman customs.

“Quo auditu mox universi compatrioti qui leges dixerint tristes effecti uno ministerio deprecari sunt quatenus permetteret leges sibi proprias & consuetudines antiquas habere in quibus vixerunt patres, & ipsi in iis nati & nutriti sunt, quia durum valde sibi foret suscipere leges ignotas, & judicare de iis quæ nesciebant; rege vero ad flectendum ingrato existente, tandem eum persecuti sunt deprecantes quatenus pro anima regis Ed-

(a) Vide Hoveden, 600. See also Ingef. 88. Brompton, 982. Knyghton, 2355.

(b) Common lawyers of the time, as Godric and Alfwin, monks of the Abbey of Abingdon were. Eadm. 173.

"vardi qui eas sub diem suum eis concesserat barones & regnum
 "& cujus, orant leges non aliorum extraneorum cogere quam sub
 "legibus perseverare patriis; unde consilio habito præcari
 "baronem tandem acquievit," &c.

Gervasius Tilburiensis, who lived near that time, speaks
 shortly, and to the purpose, thus: "Propositis legibus Anglicanis
 "secundum triplicitatem earum distinctionem, i. e. Merchenlage,
 "Westsaxon-lage, & Dane-lage, quasdam earum reprobandas
 "quasdam autem approbans illis transmarinas legis Neustrie
 "quas ad regni pacem tuendam efficacissime videbantur, adjecit."

So that by this, there appears to have been a double collection
 of laws, viz.

First, the laws of the Confessor, which were granted and
 confirmed by king William, and are also called the laws of king
 William; which are transcribed in Mr. Selden's notes upon
 Eadmerus, page 173, the title whereof is thus, viz. "Hæc sunt
 "leges & consuetudines quas Willielmus rex concessit universo
 "populo Angliæ post subactam terram eadem sunt quas Edvardus
 "rex cognatus ejus observavit ante eum." And these seem to be
 the very same that Ingulfus mentions to have been brought from
 London, and placed by him in the abbey of Crowland, in the
 fifteenth year of the same king William; "attuli eadem viam
 "meum Londini in meum monasterium legum volumen," &c.

Secondly, there were certain additional laws at that time
 established, which Gervasius Tilburiensis calls *leges Neustrie, quæ
 efficacissime videbantur ad tuendam regni pacem*; which seem to
 be included in those other laws of king William transcribed in
 the same notes upon Eadmerus, page 189. 193, &c. Which
 indeed were principally designed for the establishment of king
 William in the throne, and for the securing of the peace of the
 kingdom; especially between the English and Normans, as
 appears by these instances, viz.

The law *de murther*, or the common fine for a Norman or
 Frenchman slain, and the offender not discovered (a): The law
 for the oath of allegiance to the king (b): The introduction of the
 trial by single combat, which many learned men have thought

(a) This seems only declaratory of
 the old law. Keyl. 121. Bac. on
 Seld. par. 1. 141. p. 2. 94.

(b) The oath of allegiance seems not

to have been of Norman invention;
 for it was in use, and the law in the
 time of the Saxons. Co. Lit. 68. b.
 Eadm. 190.

was not in use here in England before William I. (I); and the law touching knights service, which Bracton, lib. 2. *supposes* to be introduced by the Conqueror, viz. [Qu. if not made by king Arthur, and revived by Edgar?]

“Quod omnes comites militea & servientes & universi liberi
 “homines totius regni habeant & teneant se semper bene in armis
 “& in equis ut decet & quod sint semper prompti & bene parati
 “ad servitium suum integrum nobis explendum & peragendum
 “cum semper opus affuerit secundum quod nobis de feodo debuit
 “& tenementis suis de jure facere et sicut illis statuimus per
 notitia

(D) The judicial combat, or duel, though it had been long established in France and Normandy, and other countries on the continent was first introduced into England by the Normans*. This, like other ordeals, was an appeal to the judgment of God for the discovery of the truth or falsehood of an accusation which was denied, or a fact that was disputed, founded on this supposition, — *that Heaven would always interpose, and give the victory to the champions of truth and innocence.* As the judicial combat was considered the most honourable, it soon became the most common method of determining all disputes among martial knights and barons, as well in criminal as in civil causes. When the combatants were immediate vassals of the crown, the combat was performed with great pomp and ceremony; in the presence of the king, with the Constable and Marshall of England, who were the judges; but if the combatants were the vassals of a baron, the combat was performed in his presence. If the person accused was victorious, he was acquitted of the crime of which he had been accused; if defeated, he was thereby convicted, and subjected to the punishment prescribed by law for his offence. If he was killed, his death was considered both as the proof and punishment of his guilt. If the accuser was vanquished, he was, by the laws of some countries, subjected to the same punishment which would have fallen upon the accused; but in England the king had a power to mitigate or remit the punishment. In civil cases, the victor gained and the vanquished lost his cause. Many laws were made for regulating the times and places of such judicial combats, the dress and arms of the combatants, and every other circumstance; which are too voluminous to be here inserted. Several kinds of persons were by these laws exempted from the necessity of defending their innocence, or their properties, by the judicial combat; as, women, priests, the sick, infirm, or maimed, with young men under twenty, and old men above sixty years of age. But all these persons might, if they pleased, employ champions to fight their causes†. See post, 145. (a)

* Leg. Aleman. tit. 44. Burgund. tit. 45.
 Coutumier de Normand. part 2. c. 2.
 Heyden Annal. p. 343.—LL. Will. c. 68.
 † See Du Cange Gloss. voc. *Duellum*.
 Spelman Gloss. voc. *Campus*. Bract. l. 2.

tract. 2. c. 21., Flou. 1. c. 34, 35.

† Glanvil. de Consuetud. Angl. l. 14.
 c. 1.—Henry's Hist. 3 v. 355. Blac. Com.
 4 v. 419. and see post.

" commune concilium totius regni prædicti, & illis dedimus & concessimus in feodo jure hæreditario." (a)

Wherein we may observe, that this constitution seems to point at two things, viz. the assizing of men for arms, which was frequent under the title *de assidenda ad arma*, and is afterwards particularly enforced and rectified by the stat. of Winton, 13 Ed. 1.—and next of conventional services, reserved by, tenures upon grants made out of the crown or knights service; called in Latin, *forinsecum*, *regale* or *servitium* (b) (K).

(a) See note (K) below.

(b) Post. cap. 11.

(K) Notwithstanding the authority of sir Matthew Hale, which tends to support the opinion, that feuds were introduced into this kingdom by the Conqueror, there are others who hold a contrary doctrine. Among these we may rank, sir Edward Coke, the Judges of Ireland, Mr. Selden, Nathaniel Bacon, sir William Temple, Saltern, and the author of the Mirror.—In truth the authorities on each side are numerous and respectable; I have therefore taken the liberty to subjoin the different opinions which have been published on the subject. I have ventured to enquire, without presuming to decide: satisfied with producing the opinions of others, I pretend not to establish any system of my own. Sir Edward Coke says, that " the tenure by knights service is of great antiquity, for so it was in the time of king Alfred." 1 Inst. 76. b. see id. 64. a. 83. a. But this opinion of sir Edward Coke, Mr. Hargrave, the late and able editor of Coke on Littleton, seems, in some degree, to controvert; vide Harg. note on Co. Lit. 61. a. and note 1. on id. 83. a.

Coke also, in the preface to his Third Report, supposes, that the *redditiones sochurum et reges servitium*, said in the book of Domesday, à *constitutione antiquorum temporum*, to belong to the church of Worcester, within the hundred of Aswaldshaw, prove socage tenure, and knight service, long before the Conquest.

The Judges of Ireland, in the case of tenures, supposed, that the *Thani majores*, or *Thani reges* among the Saxons, were the king's immediate tenants of lands, which they held by personal service, as of the king's person by grand-serjeantry, or knight service in *capite*; and that the land so held was in those times called Thaneland, as land holden in socage was called Reveland; and that after some years which followed the coming of the Normans, the title of Thane grew out of use, and that of Baron and Barony succeeded for Thane, and Thaneland. They therefore concluding sir Henry Spelman mistaken, who in his Glossary, *verb. Feudum*, refers the original of feuds in England to the Norman conquest, laid it down as most manifest, that *capite* tenures, tenures by knight service, tenures in socage, &c. were frequent in the times of the Saxons, but that indeed the possessions of bishops and abbots were first made subject to knight service in *capite* by William the conqueror, in the fourth year of his reign, &c. See " The Case of Tenures upon the Commission of Defective Titles," &c.

avo. printed at London, 1720, or the substance of the case as to this point, in bishop Gibson's preface to Spelman's Treatise of Feuds, &c.

Mr. Selden, in treating of the dignity of an earl, says, that in some places in England it was both feudal and inheritable, even from the first coming of the Saxons into England, which is commonly placed in 448 of Our Saviour, though by exact calculation it falls twenty years sooner; and that Ethelred, ealdorman of Merceland, had all that which was the kingdom of Merceland to his own use, as an earldom and fief given him in marriage with Ethelfleda, by her father king Alfred; and to prove this cites William of Malmesbury De Gest. Regum, lib. 2. cap. 4. "Londonium caput regni Merciorum cuidam Primario Ethelredo in fidelitatem suam cum filia Ethelfleda concessit." Vide Seld. Tit. of Hon. 510, 511. He says indeed, *ibid.* that Asserius and Florentius have it *servandum commendavit*: and if he had gone on, he would have found that William of Malmesbury himself, in the very next line, calls it *commissum*, and afterwards cap. 5. *commendatum*; which words rather suggest a trust than a feud. Malmes. de Gest. Regum inter Scriptores post Bedam, fol. 44. 46. and Spelm. Posthum. Treat. of Feuds, 13.

Mr. Selden likewise supposes the names of Thane and Vavasor in the Saxon times, to have been feudal; and that as earl, king's thane, and middle thane, succeeded, one the other, in the Saxon laws, so count, baron, and vavasor, are used as interpreters of them in the French laws of William I. and that the king's chances, held of the king in chief by knight service, and were of the same kind with them that were, after the Normans, honorary or parliamentary barons. Tit. of Hon. 513. and he says *ibid.* 520, that a vavasor was in the most ancient times, only a tenant by knight service, that either held of a mesne lord, and not immediately of the king, or at least of the king, as of an honour or manor, and not in chief.

Nathaniel Bacon thinks that it is not clear from any author of credit, that the Normans changed the tenures of lands; and that none of them appeared to him to be of Norman original, although they received their names according to that dialect. Bacon Hist. of the Eng. Gov. 161.

Sir William Temple observes, that those authors who will make the Conqueror to have broken or changed the laws of England, and introduced those of Normandy, pretend that the duty of escuage, with the tenures of knight service and baronage, came over in this reign; but that it needs no proof, that those with the other feudal laws were all brought into Europe by the ancient Goths, and by them settled in all the provinces which they conquered of the Roman Empire; and among the rest by the Saxons in England, as well as by the Franks in Gaul, and the Normans in Normandy. Temp. Introd. to the History of Eng. 171, 172.

Saltern supposes conveyances by feoffment and livery to have been before the Conquest, and that there were lords and tenants in the days of Gorboduc the Good, and that fealty was sworn to the prince in the time of Elidurus; which of necessity (says he) were accompanied with tenures, services, distresses, and the like. Saltern de Antiquis Britan. Legibus, cap. 8.

And lastly, the author of the Mirror imagines that tenures were ordained for the defence of the realm, by our old kings, before the Conquest. Mirr. cap. 1. sect. 3. p. 11, 12.

In opposition to these respectable authorities, and in support of sir Matthew Hale's opinion, may be adduced the sentiments of many able and learned men. Though the accession of William to the throne of England produced no very remarkable alteration in the ranks and orders of men in society; it produced (says Dr. Henry) many important changes in their political circumstances. These changes were chiefly owing to the establishment of the feudal system in England by William I. in the same state of maturity to which it had then attained in his dominions on the continent.

"In the Anglo-Saxon times, all the proprietors of land (the clergy excepted) were subjected to the following obligations, commonly called the *trinoda necessitas*—To attend the king with their followers in military expeditions;—to assist in building and defending the royal castles;—to keep the highways and bridges in a proper state*. To these three obligations, a fourth, called an heriot, was added by the laws of Canute the Great; which consisted in delivering to the king the horses and arms of his earls and thanes at their death, with certain sums of money, according to their rank and wealth†. These may be called feudal prestrations. But to these William I. added so many others, that he may be justly said to have completed, if not to have erected, the fabric of the feudal government in Britain.

The sovereign of a feudal state was, in idea at least, the proprietor of all the lands in his dominions‡. Part of the lands he retained in his own possession for the maintenance of his family, and support of his dignity; the rest he granted to certain of his subjects, as benefices or fees, for services to be performed by them; and on such other conditions as he thought proper to require, and they to accept. The idea of a feudal sovereign was almost realized in William I.—He beheld a very great proportion of the lands in England at his disposal, which enabled him to establish the feudal system of government in its full extent, with little or no difficulty.

In the distribution of the territory of England, he was not unmindful of the interests of the crown. He retained in his own possession no less than 1422 manors besides forests, parks, chases, farms, and houses, in all parts of the kingdom§. As the hopes of obtaining splendid establishments for themselves and followers, had engaged many powerful barons, and even some sovereign princes, to embark with him in his dangerous expedition, he was induced both by the dictates of honour and prudence to gratify their expectations by very liberal grants.

But none of these grants were unconditional; to all of them a great variety of obligations was annexed. These obligations were either services, which contributed to the splendour of the sovereign, and security of the kingdom; or prestrations of various kinds, which constituted a considerable part of the royal revenue.

The services to be performed by the immediate vassals of the crown, were chiefly, Homage and fealty;—Personal attendance upon the king in his court, at the three great festivals of Christmas, Easter, and Whitsuntide, and in his parliament, at other times, when regularly called;—Military services in the field

* Hicessii dissertat. Epistol. p. 60. Reliquis Spelman. p. 22.

† Wilkins Leges Saxon.

‡ Somner on Gavel. 109. Smet. de Republic. l. 3. c. 10.

§ Domesday Book passim.

or in the defence of castles for a certain time, with a certain number of men, according to the extent of estates.—By these three things, the sovereign of a feudal kingdom was secured, as far as human policy could secure him, in a splendid court for his honour, a numerous council for advice, and a powerful army for defence.

The payments or prestations, to which the immediate vassals of the crown were subjected, were chiefly,—Reserved rents;—Wardships;—On Marriages, Reliefs, Scutages, Aids.

The sovereign of a feudal kingdom never appeared in greater splendour than when he received the homage of his immediate vassals in his great court or parliament. Seated upon his throne, in his royal robes, with his crown on his head, and surrounded by his nobles, he beheld his greatest prelates and most powerful barons, uncovered and unarmed, on their knees before him. In that humble posture, they put both their hands between his, and solemnly promised “to be his liege men of life and limb and worldly worship, to bear faith and truth to him, to live and die with him, against all manner of men*.”

The courts of the Anglo-Norman kings were at all times very splendid, but more especially at the three great festivals of Christmas, Easter, and Whitsuntide, when all the prelates, earls, and barons of the kingdom were, by their tenures, obliged to attend their sovereign, to assist in the celebration of these festivals, in the administration of justice, and in deliberating on the great affairs of the kingdom. The business consisted partly in determining important causes, and partly in deliberating on public affairs†.

Military service was the greatest and most important obligation annexed to the grants of lands made by William I. and other feudal sovereigns. The intention in making these grants, was to secure a sufficient body of troops under proper leaders, well armed, and always ready to take the field, for defending the kingdom, and prosecuting such wars as were thought necessary for the honour of the prince, and the prosperity of the state‡. Lands so granted, may very well be considered as the daily pay of a certain number of troops, which the persons to whom they were granted, were obliged to keep in constant readiness for service; and therefore the number of knights fees or stipends, which every estate comprehended, was carefully ascertained. To add still further to the strength and security of the kingdom, William subjected the lands of spiritual barons to the same military services§.

Though William and other feudal sovereigns made large grants of lands to their nobility, clergy, and other vassals, they did not relinquish all connexion with and interest in the lands. On the contrary, they granted only the right of *usufruct* the lands on certain conditions; still retaining the property, or *dominium directum*, in themselves: and to put their vassals constantly in mind of this circumstance, they always reserved certain annual payments (commonly very trifling), which were collected by the sheriffs of the counties where the lands lay||.

When a vassal of the crown died, and left his heir under age, and conse-

* Spelman. Du Cange, in voc. *Homageum, Ligeum*. Littleton, sec. 85. Bracton, l. 2. c. 35. Glanvil, l. 9. c. 1. Fleta, l. 3. c. 16.

† Du Cange, voc. *Curia*. Craig, de Feu-

dis, l. 2. c. 11.

‡ 4 Inst. p. 192.

§ M. Paris, p. 5, col. 1, ann. 1070.

|| Madox Excheq. c. 10. Craig, de Feudis, l. 1. c. 9.

quently incapable of performing those personal services to his Sovereign, to which he was bound by tenure, the king took possession of his estate, that he might therewith support the heir, and give him an education suitable to his quality, and at the same time might provide another person to perform his services in his room. This right of being the guardian of all minors, male or female, who held their lands of the crown by military services, brought considerable profits into the royal coffers, or enabled the prince to enrich his favourites, by granting them the guardianship of some of his most opulent wards*.

The king's female wards could not marry any person, however agreeable to themselves and their relations, without the consent of their royal guardian, that they might not have it in their power to bestow an estate which had been derived from the crown, on one who was disagreeable to the sovereign†; a cruel and ignominious servitude. No less a sum than ten thousand marks, equal to one hundred thousand pounds of our money at present, was paid to the king for the wardship and marriage of a single heiress. The servitude was afterwards extended to male heirs‡.

The king had not only the guardianship and marriage of the heirs of all his immediate vassals, but he demanded and obtained a sum of money from them when they came of age, and were admitted to the possession of their estates; and also from those heirs who had been of age at the death of their ancestors. This last was called RELIEF, because it relieved their lands out of the hands of their sovereign, into which they fell at the death of every possessor§. Reliefs were at first arbitrary and uncertain, and of consequence the occasion of much oppression. They were afterwards fixed at the rate of one hundred shillings for a knight's fee, one hundred marks for a barony, and one hundred pounds for an earldom, which was supposed to be about the fourth part of the annual value of each||.

Scutage, or shield money, was another prestation, to which the military vassals of the crown, both of the clergy and laity, were subjected. It was a sum of money paid in lieu of actual service in the field, by those who were not able or not willing to perform that service in person, or to provide another to perform it in their room. The rate of this commutation was not always the same; but most commonly it was two marks for every knight's fee; though sometimes it was only twenty shillings, and at other times three marks, or two marks and a half¶.

Besides all these payments, the immediate vassals of the crown, who were presumed to be possessed of much affection and gratitude to their sovereign for the favours they had received from him, granted, or rather complied with the demand of certain pecuniary AID^s, on some great occasions, when he stood in particular need of their assistance. The occasions on which those aids were demanded and granted, were these: to make his eldest son a knight; to marry his eldest daughter; to ransom his person when he was taken prisoner. The

* Craig, de Feudis, l. 2. c. 2. Spelman Reliquiæ, p. 25. Gloss. voc. *Warda*. Madox Excheq. c. 10. sect. 4. Glanvil, l. 7. c. 9.
† Du Cange, voc. *Maritagium*. Glanvil, l. 7. c. 9.

‡ Madox Excheq. c. 10. sect. 4.

§ Glanvil, l. 9. c. 4.

|| Du Cange, voc. *Relerium*. Madox Excheq. c. 10. sect. 4.

¶ Du Cange, voc. *Scutagium*.

rate of these aids was also unsettled; but it seems to have been most frequently one mark, or one pound, for every knight's fee *.

There is sufficient evidence that all these services and prestations, so troublesome in themselves, and so liable to be rendered oppressive and intolerable, were brought from Normandy, and imposed by William on the leaders of his victorious army, to whom he granted great estates in England. But these were far from being the only persons who felt the weight of those feudal servitudes. For the Norman and other barons who received extensive tracts of lands, imitated the example of their sovereign in the disposal of them. They retained part of them, lying contiguous to their own castles, in their own possession, which were called their *Demesnes*; and the rest they granted to their followers, on terms exactly similar to those on which they had received them from the crown. The vassals of every baron did him homage, with a reservation of homage to the king, which was sometimes not much regarded.—They gave personal attendance in his court at stated times, or when regularly called.—They followed him into the field with a certain number of troops, according to the quantity of land they had received.—They paid him certain reserved rents.—Their heirs were his wards when under age.—They could not marry without his consent.—They gave him a relief, when they obtained possession of their estates; and aids for making his eldest son a knight, for marrying his eldest daughter, and for redeeming his person from captivity. In a word, a feudal baron was a king in miniature, and a barony was a little kingdom. Even the vassals of barons sometimes granted subinfeudations, but always exactly on the same plan. By this means all the distasteful servitudes of the feudal system descended from the sovereign to the meanest possessor of land by military tenure, becoming heavier as they descended lower †.

It is true that those possessors of land who were called *Socmen* (because, as many think, they followed the Soc or plough) were not subjected to some of the most vexatious of those feudal servitudes, as personal attendance, wardship, marriage, &c. But this was owing to the contemptible light in which they were viewed by their sovereign and his haughty barons, who would not admit them into their courts or their company; and considered the education and marriage of their heirs, as matters of small importance and unworthy of their attention. Nor were many of those *Socmen* more free, or more happy than the military vassals of the king and barons. On the contrary, they were subjected to lower and more laborious servitudes, as furnishing men, horses, and carriages, on various occasions; ploughing and sowing the lands of their lords, &c. &c. In a word, the feudal system of tenures, established by William in England, was productive of universal distress and servitude; from which even those of the higher ranks were not exempted, though they were most severely felt by the lower orders in the state ‡.

Critig in his treatise *De Jur. Feud.* 29. says, “Anglos ante conquestum vix
“puto hoc jus (scilicet feudorum) recepisse: rationes cur ita credam hæ sunt—

* Spelman. Du Cange Gloss. voc. *Aurium*. Madox Excheq. c. 15. Glauvil, l. 9. c. 8.

† Spelman. Du Cange Gloss. voc. *Baron*,

Feodum, Curia, Homogium, Warda, Maritimum, Relerium, Aurium.

‡ Spelman. Du Cange Gloss. voc. *Socmen*.

§ Dr. Henry, 3 v. p. 329.

" Scio ante conquestum multas apud Anglos leges ab Anglo-Saxonum regibus
 " ante conquestum conscriptas—Ne vestigium quidem juris feudalis in eis pene
 " reperitur, nam licet vasalorum in dominos ingratitude, sive feloniam expresse
 " aliquo statuto puniatur, pœna tamen non est amissio feudi, ut in jure feudali,
 " sed tantum vel mulcta pecuniaria, si parva sit injuria, vel pœna capitis, si
 " major, quæ juris feudalis naturam non sapiunt.—Præterea ex ipso Polydoro,
 " qui Anglorum historiam conscripsit diligentissime, constat manifeste, conquesto-
 " rum, cum omnia Angliæ prædia jure belli ad se pertinere diceret, legem
 " agrariam tulisse, quâ se omnium possessionum dominum declaravit (quod nihil
 " aliud erat quam omnia prædia de eo tanquam domino teneri,) &c."

Sir H. Spelman says, " jus feudale Anglis primus imposuit Gulielmus con-
 " questor." (Gloss. ad Mag. Chart. fol. 374.) And again, (ad verbum *Feodum*)
 " Feodorum servitutes in Britanniam nostram primus invexit Gulielmus
 " conquestor nuncupatus, qui lege ea e Normanniâ introducta Angliam
 " suis divisit commilitibus: innuit hoc ipsum codex ejus agrarius—(Quis) Feu-
 " dum et Normannium jungit, ac si rei novæ notitia e Normannia disquisenda
 " esset." And it being said by the Judges of Ireland, in the above-mentioned
 case of tenures, that sir H. Spelman, thus referring the original of feuds in
 England, to the Norman conquest, was mistaken; he wrote an elaborate treatise
 of the nature and original of feuds and tenures, in support of his opinion.
 This treatise was published by bishop Gibson 1723, among the posthumous works
 of that great man.

Mr. Somner says, " before the conquest, we were not in this kingdom
 " acquainted with what since, and to this day, we call *Feoda*, foreigners *Feodes*,
 " i. e. Fiefs or Fees, either in that general sense I mean, wherein they are dis-
 " coursed of and handled abroad in the book thence intitled *De Feudis*, at home,
 " in that called Littleton's Tenures." Treat. of Gav. 100. 104. And concludes,
 " to the Conqueror it is, that the names and customs of our English fees;
 " or (as we now vulgarly call them) tenures, such at least as are military, owe
 " their introduction."

Matthew Paris, anno 1068. fol. 6. says, that William I. " commilitibus suis
 " qui bello Hastingensi regionem secum subjugaverant, terras Anglorum et pos-
 " sessiones affluentiori manu contulit, illudque parum quod remanserat sub jugo
 " posuit perpetuæ servitutis." And again, anno 1070. fol. 7. he says, that this
 king " Episcopatus quoque et abbatias omnes quæ baronias tenebant, et cateaus
 " ab omni servitute seculari libertatem habuerant, sub servitute statuit militari,
 " irrotulans singulos episcopatus et abbatias pro voluntate suo quot milites sibi et
 " successoribus suis hostilitatis tempore voluit a singulis exhiberi: et rotulos
 " hujus ecclesiasticæ servitutis ponens in thesauris, multos viros ecclesiasticos
 " huic constitutioni pessimæ reluctantes a regno fugavit."

Mr. Camden asserts, that " the English were dispossessed of their hereditary
 " estates by William I. and the lands and farms divided among his soldiers; but
 " with this reserve, that he should still remain the direct proprietor, and oblige
 " them to do homage to him and his successors; that is (says he), that they
 " should hold them in fee, but the king alone chief lord, and they feudatory
 " lords, and in actual possession."

Dr. Hody says, that " baronies, and such tenures, were first brought into
 " England by the Conqueror." Hist. of Convoc. 117. And Bracton, speaking

regale servitium, intimates as much in these words, "secundum quod in testu fuit ad inventum." Bract. lib. 2. cap. 16. sect. 7.

Martin Wright, in his Introduction to the Law of Tenures, 52, observes William I. about the twentieth year of his reign*, and not till then, sum- all the great men and landholders in the kingdom† to do their homage, at their fealty to him: from whence he infers, that this was done in con- of something new, or that these feudal engagements would have been long before; and if so, that it is probable feudal tenures were then new. Dugd. Orig. Jurid. 6. Wilkin's Leg. Anglo-Saxon. fo. 988, 289. Cottoni na, 13. 14. 346. Mr. Hume is of opinion that they were introduced by quæror. Hist. Eng. 1 v. oct. 270. So is Blackstone, Com. 4 v. 418. but fourth chapter of the second book of his Commentaries, passim. Dr. contends for the same doctrine; vide his Lectures, 14, 15, seq. and 17:

laws of William the Conqueror, which he added to those of the Con- by which, it is apprehended, he introduced the feudal system into this are as follows.

2. "Statuimus † ut omnes liberi homines § feodere et sacramento affir- quod intra et extra || universum regnum Angliæ Regi Willielmo domino ¶ leles** esse volunt, terras et honores illius omni fidelitate ubique servare o, et contra inimicos et alienigenas defendere."

o ordain that all freemen shall oblige themselves by homage and fealty, fithin and out of the dominions of England, they will be faithful to king m. their lord, his lands and honours, with all fidelity every where with ill preserve, and against all enemies, foreign and domestic, will them l."

5. "Volumus etiam ac firmiter præcipimus et concedimus ut omnes homines totius monarchiæ regni nostri prædicti habeant et teneant terras t possessiones suas bene et in pace, libere ab omni exactione injusta, et ab tallagio; ita quod nihil ab eis exigatur vel capiatur nisi servitium suum a quod de jure nobis facere debent et facere tenentur, et prout statutum

. Pref. ad Eadmer fol. 5. Mad. fol. 6. in marg.

. of Huntingd. inter script. post 108. Hoveden, 460. and the Waverly d An. 1084. 1086.

imus. This implies it was not by the æ, but by the *commune concilium*, or, suppose, the Parliament; for the he King of England, when speak- myself, was, for ages after, in the number.

ri homines. These were tenants in service, and men of trust and repu- Brady's Answer to Petyt, p. 39.

et extra universum regnum Angliæ. rds are particular; for they deviate general principles of the feudal law, highly advantageous to William. rdsal law, no vassal was obliged to lord in war, unless it was defensive, ie thought a just one; nor for any

territories belonging to his lord which were not part of the seigniorship of which he held; but this would not effectually serve for the defence of William. He was Duke of Nor- mandy, which he held from France; and he knew the king of that country, was jealous of the extraordinary accession of power, he had gained by his new territorial acquisition, and would take every occasion, just or unjust, of attacking him there; in short, that he must be always in a state of war. Such an obligation on his tenants, of serving every where, was of the highest consequence for him to obtain: nor was it difficult; as most of them also had estates in Normandy, and were by self-interest engaged in its defence.

¶ *Willielmo domino suo*, not *regi*, not the oath of allegiance as king, but the oath of fealty from a tenant.

** *Fideles*. This is the very technical word of the feudal law for a vassal.

"est eis et illis a nobis datum et concessum jure hereditario inperpetuum per commune concilium totius regni nostri prædicti."

"We will and firmly command and grant, that all freemen of the whole monarchy of our aforesaid kingdom, may have and hold their lands and possessions well and in peace, free from all unjust exactions and taillage; so as nothing be exacted or taken, save their free services, which of right they ought and are bound to perform to us, and as it was appointed to them, and given and granted to them by us as a perpetual right of inheritance by the common council of the whole kingdom."

L. 58. "Statuimus etiam et firmiter præcipimus ut omnes comites, et barones, et milites, et servientes,* et universi liberi homines totius regni nostri prædicti habeant et teneant se semper bene in armis et in equis ut decet et oportet, et quod sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum cum super opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti, et illis dedimus et concessimus in feodo jure hereditario."†

"We ordain also, and firmly command, that all earls, and barons, and knights, and servants, and all the freemen of our whole kingdom aforesaid, shall always be fitted with horses and arms, as they ought to be, and always ready and well prepared to perform their whole service to us, when there shall be need, according to what they ought by law to do to us, by reason of their fiefs and tenements, and as we have ordained to them by the common council of our whole kingdom aforesaid, and have given and granted to them in fee in hereditary right."

L. 59. "Statuimus etiam et firmiter præcipimus ut omnes liberi homines ‡ totius regni nostri prædicti sint fratres conjurati ad monarchiam nostram et ad regnum nostrum pro viribus suis et facultatibus contra inimicos pro posse suo defendendum et viriliter servandum, pacem et dignitatem coronæ nostræ integram observandam et ad judicium rectum et justitiam constanter omnibus modis pro posse suo sine dolo et sine dilatione faciendam. Hoc decretum sanctionatum est in civitate London."

"We ordain also and firmly command, that all freemen of our whole kingdom aforesaid, be sworn brothers, manfully to preserve and defend our monarchy or government, and our kingdom, with all their power, force, and might, against enemies, and keep entire the dignity and peace of our crown, and to give right

* *Servientes*, the lower soldiers not knighted, who had not yet got lands, but were quartered on the Abbeyes. Others are of opinion, that by *servientes* are meant those who held by grand or petit serjeanty.

† This new policy seems not to have been imposed by the Conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation; which had gradually surrendered up all its allodial of free lands into the king's hands, who restored

them to the owners, as a *beneficium* or feud, to be held to them and such of their heirs as they had previously nominated to the king.

‡ *Liberi homines*—The freemen in this law are the same as those mentioned before; such as held in military tenure, though not knighted; for those were called *milites*: sometimes they are taken promiscuously one for the other; they were very different from our ordinary freeholders at this day. Answer to Petyt, p. 38, 39. Glossary, by the same author, p. 32. According to Sullivan, they were "the Saxon freeholders, and the tenants of the church, who now were subjected to knight's service."

And note, that these laws were not imposed *ad libitum regis*, but they were such as were settled *per commune concilium regni*; and possibly at that very time, when twelve out of every county were returned to ascertain the Confessor's laws, as before is mentioned out of Hoveden. Which appears to be AS SUFFICIENT AND EFFECTUAL A PARLIAMENT AS EVER WAS HELD IN ENGLAND (L).

"judgment, and constantly to do justice by all ways and means, according to their power and ability, without fraud or delay. This law was enacted in the city of London."

L. 63. "Hoc quoque præcipimus ut omnes habeant et teneant legem Edwardi regis* in omnibus rebus, adauctis hiis quas constituimus† ad utilitatem Anglorum."

"This we also command, that all our subjects have and enjoy the laws of king Edward in all things; with the addition of those which we have appointed for the benefit of the English."

Mr. Justice Blackstone and Doctor Sullivan, differ as to the time when William introduced the feudal system; the former conceiving it to have been in the twentieth, and the latter in the fourth year of his reign. It was probably in the twentieth.

On the whole, it is probable that William introduced into England the feudal law which he found established in France and Normandy, and which, during that age, was the foundation both of the stability and of the disorders in most of the monarchical governments of Europe.—It is not a little remarkable, that in tracing the great lines of the Mexican constitution, an image of feudal policy, in its most rigid form, rises to view. In truth, its spirit and principles seem to have operated in the new world, in the same manner as in the ancient. Dr. Robertson, *Hist. Amer.* 2 v. 280. Whether the law of feudal tenures, can be said to have existed in England, before the conquest, must (in the opinion of Mr. Hallam) be left to every reader's determination. In every political institution, three things are to be considered, the principle, the form, and the name. The last will probably not be found in any genuine Anglo-Saxon record. Hall. View, c. 2. 8.

* *Legem Edwardi regis*—William at his coronation swore to observe the laws of Edward the Confessor; and with respect to such of them as did not clash with his designs, he now again confirms them, adding thereto the above laws and some others.

† The word *constituimus* implies a parlia-

mentary act; and therefore extended to the Normans here, the benefit of the English laws. *Lyt. Hist. Hen. II.* 8vo. 1 v. 464. 468.

‡ *Seld. pref. Ead. 8. Mad. Excheq. 6*, in marg. *Wright's Ten.* 32.

(L) The student will find a pertinent account of the alterations of our laws under the reign of William the first, in the last chapter of the fourth volume of Mr. Justice Blackstone's Commentaries. The laws of William in the Norman language, with the Latin translation of Dr. Wilkins, as also an English one, with notes and references, were some time since published by Mr. Kelham, in his Dictionary of the Norman Language.

By all which it is apparent, first, that William I. did not pretend, nor indeed could he pretend, notwithstanding this nominal

To ascertain the laws of Edward the Confessor, we find that William summoned twelve men from every county; and this Sir Matthew Hale will have to be "as sufficient and effectual a parliament as ever was held in England." With every deference to his authority, it is apprehended that those twelve men were not members of the legislature. If they were, how came they afterwards to be discontinued till the time of Henry the third, in whose reign we first find any account of the commons? It is more than probable, that they were summoned on a particular occasion, and for a particular purpose, which none but themselves could answer. William, on his coronation, had sworn to govern by the laws of Edward the Confessor; some of which had been reduced into writing, but the greater part consisted of the immemorial customs of the realm. Having distributed the confiscations among his followers, foreigners and strangers to those laws and customs, it of course became necessary to ascertain them; to effect which he summoned twelve Saxons from every county. That they were not legislators is evident from this, that when William wanted to revive the Danish laws, which had been abolished by the Confessor, but which were somewhat similar to the Norman mode of jurisprudence, they prevailed against him; not by refusing their consent, but by intreaty and adjuration. They intreated him by their tears and the prayers, and adjured him by the soul of Edward his benefactor.

Who were the constituent members of the great councils or parliaments of this period, is a question which has been differently answered and warmly agitated.* That all archbishops, bishops, abbots, priors, earls, and barons, who held each an entire barony immediately of the king *in capite*, were constituent members of these great councils, has never been denied, and needs not be proved. Besides those great spiritual and temporal barons, there were many others who held smaller portions of land, as one, two, three or four knights' fees, immediately of the king, by the same honourable tenure with the great barons; who were also members of the great councils of the kingdom, and were commonly called the lesser barons, or free military tenants of the crown. Among many evidences which might easily be produced of this, the fourteenth article of the Great Charter of king John is one of the most decisive, and seems to be sufficient. "To have a common council of the kingdom, to assess an aid otherwise than in the three foresaid cases,† or to assess a scutage, we will cause to be summoned the archbishops, bishops, earls, and greater barons, particularly by our letters; and besides, we will cause to be summoned in general, by our sheriffs and bailiffs, all those who hold of us *in capite*." But besides all these great and small barons, who, by virtue of their tenures, were obliged, as well as entitled, to sit as members in the great councils of the kingdom; our historians of this period sometimes speak of great multitudes of people, both of the clergy and laity, who were present in some of those councils.‡ Eadmerus, the friend and secretary of arch-

* Petyt's Rights of the Commons asserted, Jan. Angl. Facies Nova, Dr. Brady's Tracts, &c. &c.

† These three foresaid cases were, to make

his eldest son a knight; to marry his eldest daughter; to redeem his own person; in all which cases, aids were due by tenure.

‡ Spelman, Concil. l. 2. p. 33.

conquest, to alter the laws of this kingdom without common consent *in communi concilia regni*, or in parliament. And, secondly, that if there could be any pretence of any such right, or if in that turbulent time something of that kind had happened; yet by all those solemn capitulations, oaths, and concessions, that pretence was wholly avoided, and the ancient laws of the kingdom settled, and were not to be altered, or added unto, at the pleasure of the Conqueror, WITHOUT CONSENT IN PARLIAMENT.

In the seventeenth year of his reign, or, as some say, the fifteenth, he began that great survey recorded in two books, called the Great Domesday Book, and Little Domesday Book, and

bishop Anselm, thus describes the persons assembled in a great council at Rockingham, A. D. 1095, to whom his patron made a speech "Anselm spoke to the bishops, abbots, and princes or principal men, and to a numerous multitude of monks, clerks, and laymen standing by."* By the bishops, abbots, and princes, we are certainly to understand the spiritual and temporal barons. But who are we to understand by "the numerous multitude of monks, clerks, and laymen standing by?" Were they members of this assembly, or were they only spectators and by-standers? If by the multitude of those clerks and laymen, the historian did not mean the lesser barons, it is highly probable that they were only spectators. We are told by several contemporary historians, that the great councils of the kingdom in those times, were very much incommoded by crowds of spectators, who forced their way into their meetings. One of the historians thus describes a great council held by king Stephen: "The king, by an edict, published through England, called the rulers of the churches, and the chiefs of the people, to a council at London. All these coming thither, as into one receptacle, and the pillars of the churches being seated in order, and the vulgar also forcing themselves in on all hands, confusedly and promiscuously, as usual, many things were usefully proposed, and happily transacted, for the benefit of the church and kingdom."† In a great council held at Westminster, May 18, A. D. 1127, the spectators, who are said to have been innumerable, were so outrageous, that they interrupted the business of the council, and prevented some things from being debated.‡ Upon the whole, it seems to be almost certain, that though great numbers of people of all ranks, prompted by political curiosity, or interested in the affairs which were to be debated, attended the great councils of the kingdom in this period, none were properly members of the councils but those described in the Great Charter of king John, viz. the spiritual and temporal barons, who were personally summoned; and those who held smaller parcels of land than baronies, immediately of the king, by knight's service, who were summoned edictally by the sheriffs of their respective counties.§

* Eadmeri Hist. p. 26.

† Gesta Stephani Regis, apud Duchene, p. 938.

‡ Spelman, Concil. l. 2. p. 35.

§ Hen. Hist. 3 v. 345.

finished it in the twentieth year of his reign, anno Domini 1086(a), as appears by the learned preface of Mr. Selden to Eadmerus, and indeed by the books themselves; the original record of which is still extant, remaining in the custody of the vice-chamberlains of his majesty's exchequer. This record contains a survey of all the ancient demesne lands of the kingdom, and contains in many manors, not only the tenants' names, with the quantity of lands and their values, but likewise the number and quality of the residents or inhabitants, with divers rights, privileges, and customs claimed by them. And being made and found by verdict, or presentment, of juries, in every hundred, or division, upon their oaths, there was no receding from, or avoiding, what was written in this record. And therefore, as Gervasius Tilburiensis says, page 41. "Ob hoc nos eundem librum judicarium nominamus; non quod in eo de propositis aliquibus dubiis feratur sententia, sed quod ab eo sicut ab ultimo die iudicii non licet ulla ratione discedere." (M)

(a) At the end of Doomsday Book in a large coeval hand. *Mad. Ech.* the date, or year, viz. 1086, is written 1 v. 296. *Wright's Ten.* 56, 58.

(M) The book called Doomsday proves the great and extensive genius, and does honour to the memory of William. There were, it is said, two ancient examples of the same kind in the times of Ethelbert and Alfred. It was begun in the year 1081, and was a general survey of all the lands in the kingdom; their extent in each district; their proprietors, tenures, value; the quantity of meadow, pasture, wood, and arable land, which they contained; and in some counties, the number of tenants, cottages, and slaves of all denominations, who lived upon them. He appointed commissioners for this purpose, who entered every particular in their register by the verdict of juries; and after a labour of SIX YEARS (for the work was so long in finishing) brought him an exact account of all the landed property of his kingdom. *Chron. Sax.* 190. *Ingulf.* 79. *Chron. T. Tykes.* 28. *H. Hunt.* 370. *Hoveden.* 460. *M. West.* 229. *Flor. Wigorn.* 641. *Chron. Abb. St. Petri de Burgo.* 51. *M. Paris.* 8. Compiled, as it was, by different sets of Commissioners, the language sometimes varies in describing the same class of persons. The *liberi homines*, of whom we find frequent mention in some counties, were perhaps not different from the *thaini*, who occur in other places. The subject however, (in the opinion of Mr. Hallam) is very obscure, and seems at present unattainable. *Hall. View.* c. 8. The three northern counties, Westmoreland, Cumberland, and Northumberland, were not comprehended in this survey, on account of their wild, uncultivated situation. This monument, called DOMESDAY BOOK, the most valuable piece of antiquity possessed by any nation, is still preserved in the exchequer; and though only some extracts of it have hitherto been published, yet it serves to illustrate to us in many particulars, the ancient state of England. Alfred had finished a like survey of the kingdom in

And thus much shall suffice touching the fifth general head; namely, of the progress made after the coming in of king William,

is time, which was long kept at Winchester, and which probably served as a model to William in this undertaking.

Mr. Madox, in his History of the Exchequer* says, "the great and memorable survey of the lands holden in DEMESNE within this realm, which was finished in the year 1086, and is called DOMESDAY BOOK, sheweth under the title TERRA REGIS, what and which the demesnes of the crown were, at that time, and in the time of king Edward the Confessor: and hath been ever since counted the great index, to distinguish the king's demesnes from his escheats and other lands, and from the lands of other men." It is generally known, that the question "whether lands are ancient demesne or not?" is to be decided by the DOMESDAY of William I. from whence there is no appeal; and it is a book of that authority, that even the Conqueror himself submitted some cases, wherein he was concerned, to be determined by it. See before note (G) on this chapter.—And Hallam's *Normans*, c. 8.

It may be necessary to notice some conjectures respecting the etymon of the word DOMESDAY. Many have supposed it to allude to the final day of judgment. Hammond apprehends, that the addition of DAY to this DOME-BOOK, was not meant with any allusion to the final day of judgment, but was to strengthen and confirm it; and signifieth the JUDICIAL DECISIVE RECORD, or, BOOK OF DOOM—NO JUDGMENT AND JUSTICE. But the Observer on our ancient Statutes goes farther: "the common etymology of the word DOMESDAY, (says Barrington) in which all the Glossaries agree, viz. the comparison of it to the day of judgment, never appeared to me satisfactory. If this whimsical account of the name was the real one, the Latin for it would be DIES JUDICII; whereas, in all the old Chronicles, it is stiled either LIBER JUDICIALES or CENSUALIS. Bullet, in his Celtic Dictionary, hath the word DOM; which he renders *Seur*, *Seigneur*, and hence the Spanish word DON; as also the words DEYA and DEIA, which he translates PROCLAMATION, ADVERTISEMENT. Domesday therefore may signify the lord's or king's advertisement to the tenants who hold under him, and this sense of the word agrees well with part of the contents of this famous survey. See likewise Upton's notes on b. 1. canto vii. st. 26. of Spenser's Faerie Queen, where he produces instances of the word DAYE signifying judgment; and DAYES-MAN, an arbitrator or judge. In the north of England, an arbitrator, or elected judge, is usually termed a dies-man, or days-man: and Dr. Hammond saith, that the word DAY in all idioms signifies judgment. "In a petition to the king in parliament, by the treasurer and barons of the exchequer, they certify with regard to the manor of Tring in Hertfordshire, *Invenimus in libro vestro qui vocatur Domesday, &c.*" 6 Edw. 1. A.D. 1278. amongst the collection published by the munificence of parliament.†

Camden calls this book *Gulielmi librum censualem*, the tax book of king William; it was also called *Magna Rolla Winton*. The dean and chapter of York have a register stiled Domesday; so hath the bishop of Worcester; and there is an ancient roll in Chester-castle called Doomsday-Roll.

* Vol. I. 296.

† Bar. on Stat. 270.

relating to the laws of England, their establishment, settlement, and alteration. If any one be minded to see what this prince did

That the reader may have some idea of the manner of entering the lands in this book, I have selected the following instances.

" *Essessa Terra Regis Dimid. Hundred. de Witham. Witham tenuit Haroldus t. R. E. pro maner. et pro 5 hidis: tunc 21 villan. modo 15; tunc 9 bordar. modo 10; tunc 6 servi, modo 9; tunc 23 sochemanni, et modo similiter; tunc inter totum valebat 10 lib. modo 20; sed vicecomes inter suas consuetudines et placita, de dimid. hundred. recepit inde 34 lib. et 4 lib. de gersuma. In hoc manerio adjacebant t. R. E. 34 liberi homines, qui tunc reddebant 10 sol. de consuetudine et 11d. Ex illis tenet Ilbodus 2, de 45 acr. et val. 6 sol. et redd. maner. suam consuetudinem. Tedricus Pointel 8, de dimid. hid. et 22 acr. dimid. reddentes consuetud. Ranulph Piperel 10, de 2 hid. et 45 acr. non reddentes consuetudinem. Willielmus Grosse 5, et unus tantum reddit consuetudinem, et val. 3 lib. 13s. Rad. Baignard 6, et unus reddit consuetud. et val. 20s. Hamo dapifer 1, de dimid. hid. et val. 20s. Goscelinus Loremarus habet terrata unius, et non reddit consuet. &c. Modo custodit hoc manerium Petrus vicecomes in manu regis.*"

Thus in English: "Essex (title in the top of the leaf); the King's Land;" and before the particular manor or town, the hundred in which it lies is noted, as here, "The Half Hundred of Witham. Harold held Witham, in the time of king Edward, for a manor and for 5 hides. Then there were twenty-one villains, now fifteen (for they recorded what was in Edward the Confessor's time, as well as in that of the Conqueror); then there were nine bordars, now ten; then 6 servants or slaves, now 9; then there were twenty-three sochemans, now the same number; then the whole was valued at ten pounds, now twenty pounds. But the viscount, or sheriff, received from the half hundred, for his customs, and mulcts, or forfeitures, thirty-three pounds, and four pounds for fine or income. In this manor, or belonging to this manor, or in the bounds of this manor, there were in the time of king Edward thirty-four freemen, which then paid an accustomed rent of ten shillings and eleven pence. Of these, Ilbods holds two, which had forty-five acres, and they were worth to him six shillings, and paid their old rent to the manor. Tedric Pointel holds eight, who had half a hide, and twenty-two acres and a half; paying custom or old rent. Ranulph Piperel holds ten, who had two hides and forty-five acres, which paid no custom or old rent. William Grosse holds five, and only one of them paid custom, and were worth to him three pounds thirteen shillings (by the year is to be understood in all these sums). Ralph Baignard holds six, and one paid custom; they were worth twenty shillings. Hamo, the sewer or steward, holds one, who had half a hide, and was worth to him twenty shillings. Goscelin Loremar hath the land of one, and pays no custom. Peter the viscount, or sheriff, keeps this manor in the king's hand."

" *Essessa Terra Regis Hund. de Beventre. Haveringas tenuit Haroldus t. R. E. pro 1 maner. et pro 10 hid. Tunc 41 villan. modo 40; semp. 41 bordar. et 6 servi, et 2 car. in dominio; tunc 41 car. hominum, modo 40; sylv. d. porc. c. acr. prati; mod. 1 molen. et 2 runc. et 10 animalia, et 160 porc. et 269. ov.*"

ference to ecclesiastics, let him consult Eadmerus, and the notes of Mr. Selden upon it; especially page 167, 168,

maner. adiacebant 4. lib. homines, de 4 hidis, t. R. E. reddentes consuetudin; modo ten. 3 hid. Rob. fil. Corbutionis, Hugo de Montafori quartam n, et non reddidere consuetudinem esse quo eas habuere, &c. Hoc maner. R. E. 36 l. modo 40; et Petrus vicecomes inde recepit 80 l. de censu, et 10 l. ersuma."

is in English: "Essex (title as before); the King's Land; the Hundred aventre. Harold held Haveringe, in the time of Edward the Confessor, me manor and ten hides. Then there were forty-one villains, now forty; were always forty-one bordars, and six servants or slaves, and two carucates mesne, or the lord's lands; there were forty-one carucates among the men nants, now forty; wood sufficient for five-hundred hogs, one hundred acres leadow; now one mill, and two working-horses, or packhorses, and ten g growing beasts, one hundred and sixty hogs, and two hundred and sixty-sheep. To this manor there belonged four freemen, who had four hides in me of Edward the Confessor, paying an accustomed rent. Now Robert, of Corbutio, holds three of those hides, and Hugh Montfort the fourth, and paid no rent since they held them. This manor was worth thirty-six ds; now forty; and Peter the viscount, or sheriff, receives from it eighty ds for rent, and ten pounds for an income or fine." It is full of decisive also, that the English lords had their Courts, wherein they rendered justice : suitors, like the continental nobility;—"privileges" (adds Mr. Hallam) h are noticed with great precision in that record, as part of the statistical y. For the right of jurisdiction, at a time when punishments were st wholly pecuniary, was a matter of property, and sought from motives of ity as well as pride." View, c. 8.

: contents of Doomsday-Book are summed up in the following verses—

Quid deberetur fisco, quæ, quanta tributa,
 Nomine quid census, quæ vectigalia, quantum
 Quisque teneretur feodali solvere jure,
 Qui sunt exempti, vel quos angaria damnat,
 Qui sunt vel glebæ servi, vel conditionis,
 Quove manumissus patrono jure ligatur.

s book is still remaining, fair and legible; consisting of two volumes, a and a less; the greater comprehending all the counties of England, except mberland, Cumberland, Westmorland, Durham, and part of Lancashire, were never surveyed; and except Essex, Suffolk, and Norfolk, which are hended in the lesser volume. It was formerly kept under three different nd keys; one in the custody of the treasurer, and the others of the two ernels of the exchequer. It is now deposited in the chapter-house at inster, where it may be consulted, on paying the proper officer a fee of 6s. for a search, and 4d. per line for a transcript.

e meritorious industry of modern times, has applied itself to a similar survey part of the kingdom, and will, it is hoped, in the end, embrace the whole Sir John Sinclair, in the year 1791, published a Statistical Account of ad; of which it has been said, "that no publication of equal information

&c. where we shall find how this king divided the episcopal consistory, from the county court, and how he restrained the clergy and their courts from exercising ecclesiastical jurisdiction upon tenants *in capite* (a).

(a) Blac. Com. 4 v. 415, 416. and see note (H) on this chapter.

“and curiosity has appeared in Great Britain since Domesday-Book; and that from the ample and authentic facts which it records, it must be resorted to by every future statesman, philosopher, and divine, as the best basis that has ever yet appeared for political speculation.”

On a similar, though more confined scale, is Mr. Lysons' “Historical Account of the Towns, Villages, and Hamlets, within Twelve Miles of London.”

For farther particulars concerning Domesday-Book, see Spelm. Gloss. *ad verbum* Domesdei. Seld. Pref. ad Eadm. 3, 4. Gerv. de Tilb. Dial. de Scacc. l. 1. c. 16. Ingulf. Hist. int. Script. post Bedam, 908, 909. Also an account of it printed by order of the Antiq. Soc. in 1756, and Grose's Antiq. of England and Wales. There is an extract from Domesday-Book in the type projected by Mr. Nichols, and in which that valuable record has been since printed, in Martin's History of Thetford.

CHAP. VI.

Concerning the parity or similitude of the laws of England and Normandy, and the reasons thereof.

THE great similitude that in many things appears between the laws of England and those of Normandy, has given some occasion, to such as consider not well of things, to suppose that this happened by the power of the Conqueror, in conforming the laws of this kingdom to those of Normandy; and therefore will needs have it, that our English laws still retain the mark of that conquest, and that we received our laws from him, as from a conqueror: than which assertion, as it appears even by what has before been said, nothing can be more untrue. Besides, if there were any laws derived from the Normans to us, as perhaps there might be some, yea possibly many; yet it no more concludes the position to be true, that we received such laws *per modum conquestus*, than if the kingdom of England should, at this day, take some of the laws of Persia, Spain, Egypt, or Assyria, and by authority of parliament settle them here: which though they were for their matter foreign, yet their obligatory power, and their formal nature or reason of becoming laws here, were not at all due to those countries, whose laws they were; but to the proper and intrinsical authority of this kingdom, by which they were received as, or enacted into, laws. And therefore, as no law that is foreign, binds here in England, till it be received and authoritatively engrafted into the law of England; so there is no reason in common prudence and understanding for any man to conclude, that no rule or method of justice is to be admitted in a kingdom, though never so useful or beneficial, barely upon this account,—that another people entertained it, and made it a part of their laws before us (a).

(a) That there was a very great similarity between the laws of England and of Normandy, soon after the conquest, is undeniable. This similarity doth not

But as to the matter itself, I shall consider, and enquire of the following particulars, viz.

1. How long the kingdom of England and duchy of Normandy stood in CONJUNCTION, under ONE governor.

2. What evidence we have touching the laws of Normandy and of their agreement with ours.

3. Wherein consists that parity, or disparity, of the English and Norman laws.

4. What might be reasonably judged to be the reason and foundation of that likeness, which is to be found between the laws of both countries.

First, touching the conjunction under one governor of England and Normandy.

We are to know, that the kingdom of England and duchy of Normandy were *de facto*, in conjunction, under these kings, viz. William I. William II. Henry I. king Stephen, Henry II. and Richard I. who, dying without issue, left behind him Arthur, earl of Britain, his nephew, only son of Geoffry earl of Britain, second brother of Richard I.—and John the youngest brother to Richard I. who afterward became king of England by usurping the crown from his nephew Arthur. But the princes of Normandy still adhered to Arthur,—“*sicut domino liget, sic dicentes iudicium & consuetudinem esse illarum regionum ut Arthurus filius fratris senioris in patrimonio sibi debito & hæreditate avunculo suo succedat eodem jure quod Gualfridus pater ejus esset habiturus si regi Richardo defuncto super vixisset.*”

And therein they said true, and the laws of England were the same. Witness the succession of Richard II. to Edward III. Also the laws of Germany and the ancient Saxons were accordant

subsist only in matters of essential justice, but in the rules of descents—in the terms of limitations—in the forms of writs, and in other things of an indifferent nature, which could neither have arisen from necessity, nor have fallen out by accident. The only question is, how this similarity was produced, Whether by the exportation of the English laws into Normandy, or the importation of the Norman laws into England? Something of both might have happened in the course of time; but in the reign of William I. it is evident, (however Sir Matthew

Hale doubted it) both from the nature of things, and the concurrent testimony of historians, that the current of laws and customs ran strong from Normandy into England. Eadmeri Hist. 6. But notwithstanding the changes which were made in the ancient constitution, in the government and laws of England, by the conquest, it must not be imagined that they were quite destroyed. This was so far from being the case, that many of them were preserved and even adopted by the Conqueror. Vide cap. v.

ito. And it was accordingly decided in a trial by battle (a), Otho the emperor, as we are told by Radulphus, *de Dicetio* no 945. And such are the laws of France to this day; Chopinotus *de Dominio Franciæ*, lib. 2. tit. 12. And such the ancient customs of the Normans, as we are told by the *Coutumier*, cap. 99. And such is the law of Normandy, of the isles of Jersey and Guernsey, which some time were thereof, at this day, as is agreed by Terrier, the best expositor of their customs, lib. 2. cap. 2. And so it was adjudged, in my remembrance, in the isle of Jersey, in a controversy between John Perchard and John Rowland, for the goods of the late of Peter Perchard.

It nevertheless, John the uncle of Arthur came by force and, *et Rotomagum gladio ducatus Normanniæ accinctus est ministerium Rotomagensis archiepiscopi*," as Matthew Paris told shortly after also usurped the crown of England, and named his nephew Arthur, who died in the year 1202, being, as supposed, murdered by his said uncle. Vide Matthew *in fine regni regis Ricardi primi*, and Walsingham in his *igma Neustriæ, sub eodem anno 1202 (b)*.

This species of trial is of great antiquity. It was introduced into England by William the Conqueror. *Ill. cap. 68.* See chap. v. In cases used, see Black. Com. 37. and 4 v. 346. Barring. 202. 294. For the foundation of this mode of trial, see Dr. Roberts. *Hist. Cha. V. c. 64. seq.* It was authorized by *legistics*. *Id.* 357. But see the case of *Ashford v. Thornton*, 10 & Ald. 403. and the argument used by Mr. Kendall, in 1818, for giving largely the right of an appeal-murder, to insist on trial by battle, and also for abolishing appeals. We now however at an end: for Geo. 3. c. 46. "all appeals of treason, murder, felony, or other offences, shall cease, determine, and become void, and be utterly abolished, and in any point of right, the plaintiff shall not be received to wage battle, nor shall issue be joined, nor be had by battle in any writ of right." Trial by single combat, was used by the Saxons in matters both of right and title; in the first with

sharp, and in the last with blunt weapons. No one could refuse battle offered, but such as were too excellent, as the king; too sacred, as the clergy; too weak, as women, children, maimed persons; too inscient, as idiots, lunatics; or too mean, as villains.

(b) Mr. Hume, in treating of the death of this unhappy prince, observes, that the circumstances which attended this deed of darkness were, no doubt, carefully concealed by the actors, and are variously related by historians: but the most probable account is as follows. The king, it is said, first proposed to William de la Brave one of his servants, to dispatch Arthur; but William replied, that he was a gentleman, not an assassin; and positively refused compliance. Another instrument of murder was found, and was dispatched with proper orders to Falaise; but Hubert de Bourg, chamberlain to the king, and constable of the castle, feigning that he himself would execute the king's mandate, sent back the assassin, spread the report that the young prince was dead, and publicly performed all the ceremonies of his interment; but

And to countenance his usurpation in Normandy, and to give himself the better pretence of title, he by his power so far prevailed there, that HE OBTAINED A CHANGE OF THE LAW THERE, purely to serve his turn, by transferring the right of inheritance from the son of the elder brother, to the younger brother; as appears by the *Grand Coutumier*, cap. 99. But withal, the gloss takes notice of it as an INNOVATION, and brought in by men of power, though it mentions not the particular reason, which was as aforesaid.

The king of France, of whom the duchy of Normandy was holden, highly resented the injury done by king John to his nephew Arthur; who, as was strongly suspected, came not fairly to his end. He summoned king John, as duke of Normandy, into France, to give an account of his actions; and upon his default of appearing, he was by king Philip of France, forejudged of the said duchy. Vide *Mat. Paris, in initio regni Johannis*. And this sentence was so effectually put in execution, that in the year 1204, *Mat. Paris* tells us, "tota Normannia, Turania, Andegavia, & Pictavia, cum civitatibus & castellis & rebus aliis præter Rupellam, Toar, & Mar. Castellam sunt in regis & Francorum dominium devoluta." (a)

But yet he retained, though with much difficulty, the islands of Jersey and Guernsey, and the uninterrupted possession of some parts of Normandy, for some time after. And both he and his son king Henry III. kept the style and title of Dukes of Normandy, &c. till the 43d year of king Henry III. At which time (for 9000 livres Tournois, and upon some other agreements) he resigned Normandy and Anjou to the king of France (b), and never afterwards used that title, as appears by the *Continuation*

finding that the Bretons vowed vengeance for the murder, and that all the revolted barons persevered more obstinately in their rebellion, he thought it prudent to reveal the secret, and to inform the world, that the duke of Brittany was still alive, and in his custody. This discovery proved fatal to the young prince. John first removed him to the castle of Rouen, and, coming in a boat, during the night-time, to that place, commanded Arthur to be brought forth to him. The young prince, aware of his danger, and now more subdued

by the continuance of his misfortunes, and by the approach of death, threw himself on his knees before his uncle and begged for mercy; but the barbarous tyrant, making no reply, stabbed him with his own hands; and, fastening a stone to the dead body, threw it into the Seine.—*Hume's Hist.* 2 v. oct. 48.

(a) *W. Heming*, 445. *M. West.* 264. *Knyghton*, 2420. *Trivet*, 144. *Gul. Britto*, l. 7. *Ann. Waverl.* 168.

(b) *Rymer*, 1 v. 675. *M. Paris*, 566. *Chron. T. Tykes*, 53. *Trivet*, 208. *M. Westm.* 371.

of Mont. Paris, *sub anno* 1260. Only the four islands, some time parcel of Normandy, were still, and to this day are, enjoyed by the crown of England, viz. Jersey, Guernsey, Sarke, and Alderney, though they are still governed under their ancient Norman laws (a).

Secondly, as to the second enquiry, what evidence we have touching the laws of Normandy.

The best, and indeed only common evidence of the ancient customs and laws of Normandy, is that book which is called the *Grand Coutumier* of Normandy, which in later years has been illustrated, not only with a Latin and French gloss, but also with the commentaries of Terrier, a French author.

This book does not only contain many of the ancienter laws of Normandy, but most plainly it contains those laws and customs which were in use here, in the time of king Henry II. king Richard I. and king John; yea, and such also as were in use and practice in that country after the separation of Normandy from the crown of England (b). For we shall find therein, in their writs and processes, frequent mention of king Richard I. and the entire text of the 110th chapter thereof, is an edict of Philip king of France, after the severance of Normandy from the crown of England. I speak not of those additional edicts which are annexed to that book, of a far later date. So that we are not to take that book as a collection of the laws of Normandy, as they stood BEFORE the accession or union thereof to the crown of England; but as they stood LONG AFTER, under the time of those dukes of Normandy that succeeded William I. And it seems to be a collection made AFTER the time of king Henry III. or, at least, AFTER the time of king John; and consequently it states their laws and customs, as they stood in use and practice about the time of that collection made, which observation will be of use in the ensuing discourse.

Thirdly, touching the third particular, viz. the agreement and disparity of the laws of England and Normandy.

It is very true, we shall find a great suitableness in their laws, in many things agreeing with the laws of England; especially as they stood in the time of king Henry II.—The best indication whereof we have in the collection of Glanville; the rules of

(a) Vide post, cap. ix.

(b) It was composed about 14 H. 3. 1229.

descents, of writs, of process, of trials, and some other particulars, holding a great analogy in both dominions, yet not without their differences and disparities in many particulars (a), viz.

First, some of those laws are such as were never used in England. For instance, there was in Normandy a certain tribute paid to the duke, called *Monya*, i. e. a certain sum yielded to him, in consideration that he should not alter their coin, payable every three years. Vide *Coutumier*, cap. 15 (b). But this payment was never admitted in England. Indeed it was taken for a time, but was ousted by the first law of king Henry I. as an usurpation. Again, by the custom of Normandy, the lands descended to the *bastard eigne*, born before marriage of the same woman, by whom the same man had other children after marriage. *Coutumier*, cap. 27. But the laws of England were always contrary, as appears by Glanville, lib. 7. cap. 13. and the statute of Merton, which says, *Nolumus leges Anglicanas mutare, &c.* Again, by the laws of Normandy, if a man died without issue, or brother, or sister, the lands did descend to the father. *Coutumier*, cap. 15. Terrier, cap. 2. But in England, this law seems never to have been used.

Secondly, again, some laws were used in Normandy, which were in use in England LONG BEFORE the supposed Norman conquest, and therefore could in no possibility have their original force, or any binding power here, upon that pretence. For instance, it appears by the *Coutumier* of Normandy, that the sheriff of the county was an annual officer, and so it is evident he was likewise in England before the conquest. And among the laws of Edward the Confessor, it is provided, "quod aldermanni in civitatibus eandem habeant dignitatem qualem habent ballivi hundredorum in ballivis suis sub vicecomitem." Again, wreck of the sea, and treasure trove, was a prerogative belonging to the duke of Normandy, as appears by the *Coutumier*, cap. 17. & 18.

on it was belonging to the crown of England before the

duke.

—And so

(a) Salliv. Lect.

(b) Monya, or Ma.

of one shilling on eve.

levied once in every th.

was granted to induce the s.

to debase the coin. Thus t.

received money from his subject.

only for doing good, but for not a.

all the evil in his power. M. Paris, d.

The king, by his prerogative, may

xxix.

moneyage, was a tax

every hearth; and

three years. It

sovereign not

the prince

s; not

going

8.

make money of what matter and form

he pleases; may establish its standard

and change its substance and impres-

sion.—If so, it is strange, that acts of

parliament were anciently made relat-

ing to the coin and the change of it; as

in 1247, 31 H. III. See Mat. Par. in

vita Hen. I. Mir. c. 1. s. 3. Chron.

Tho. Wykes, Ed. 1225. 1278.

conquest; as appears by the charter of Edward the Confessor to the abbey of Ramsey, of the manor of Ringstede, "cum toto relictu maris quod wreccum dicitur," and the like. Vide *ibid.* of treasure trove, & vide the laws of Edward the Confessor, cap. 14. So fealty, homage, and relief, were incident to tenures by the laws of Normandy. Vide *Coutumier*, cap. 29. And so they were in England BEFORE the conquest; as appears by the laws of Edward the Confessor, cap. 35. and the laws of Canutus, mentioned by Brompton, cap. 8.—So the trial by jury of twelve men, was the USUAL trial among the Normans, in most suits; especially in assizes, *et juris utrum*; as appears by the *Coutumier*, cap. 92, 93, 94. And THAT TRIAL WAS IN USE HERE IN ENGLAND BEFORE THE CONQUEST, as appears in Brompton among the laws of king Æthelred, cap. 3. which gives some specimen of it, viz. "Habeant placita in singulis wapentachiis & exeant seniores duodecim thani vel præpositus cum iis & jurent quod nullum innocentem accusare nec noxium concealare (a)."

Thirdly, again, in some things, though both the law of Normandy and the law of England agreed in the fact, and in the manner of proceeding, yet there was an apparent discrimination of their law from ours.—As for instance, the husband seised in right of the wife, having issue by her, and she dying, by the custom of Normandy he held—but only during his widowhood. *Coutumier*, cap. 119. But in England, he held during his life, by the courtesy of England.

Fourthly, but in some things the laws of Normandy agreed with the laws of England, especially as they stood in the times of Henry II. and Richard I. so that they seem to be, as it were, copies or counterparts one of another. Though in many things the laws of England are since changed in a great measure from what they then were. For instance, at this day in England, and for very many ages past, all lands of inheritance, as well socage tenures, as of knight's service, descend to the eldest son; unless in Kent, and some other places, where the custom directs the descent to ALL the males, and in some places to the youngest. But the ancient law used in England, though it directed knights services and serjeanties to descend to the eldest son, yet it directed assalages and socage lands to descend to all the sons. Glanvil. lib. 7. cap. 3. And so do the laws of Normandy to this day. Vide *Coutumier*, cap. 26. & *post hic*, cap. 11.

(a) Vide cap. xii.

Again, leprosy AT THIS DAY does not impede the descent; but by the laws in use in England, in the elder times, until the time of king John, and for some time afterwards, leprosy did IMPEDE the descent. As *placito quarto Johannis*, in the case of W. Fulch, a judge of that time. And according were the laws of Normandy. Vide *Le Coutumier*, cap. 27. and the 11th chapter of this History.

Again, at this day, by the law of England, in cases of trials by twelve men, ALL OUGHT TO AGREE, and any one dissenting, no verdict can be given. But by the laws of Normandy, though a verdict ought to be by the concurring consent of twelve men, yet in case of dissent, or disagreement, of the jury, they used to put off the lesser number that were dissenters, and added a kind of *tales* equal to the greater number so agreeing until they had got a verdict of twelve men that concurred. *Coutumier*, c. 93. (a) And we may find some ancient footsteps of the like use HERE in England, though long since antiquated; vide Bracton, lib. 4. cap. 19. where he speaks thus—"Contingit etiam multoties quod iuratores in veritate dicenda sunt sibi contrarii ita quod in unam concordare non possunt sententiam, quo casu de consilio curie affortietur assisa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex & adjungantur aliis, vel etiam per seipsos sine aliis, de veritate discutiant & judicent, et per se respondeant & eorum veredictum allocabitur & tenebitur cum quibus ipsi convenirent." (b)

Again, at this day, by the laws of England, a man may give his lands in FEE SIMPLE, which he has by descent, to any one of his children and disinherit the rest. But by the ancient laws used here, it seems to be otherwise. As Mich. 10 Johannis, Glanv. lib. 7. cap. 2. the case of William de Causeia. And accordingly were the laws of Normandy, as we find in the *Grand Coutumier*, cap. 36. "Quand le pere avoit plusieurs fills, ils ne peut faire de son heritage le un meilleur que le autre." And yet it seems to this day, in England, it holds some resemblance in cases of frank-marriage; viz. that the dower, in case she will have any part of her father's other lands, ought to put her lands in hotch-pot (c).

(a) Vide cap. xii.

(b) Or the judges might compel them to agree—or, amerce the dissenters. Bract. l. 4. c. 19. s. 4. Brit. c. 52.

Fleta, l. 4. c. 9. s. 2.

(c) Lit. sect. 17. 19, 20. 266 to 275. 292. Bract. l. 2. c. 54. Brit. c. 72.

Again, by the law of England, the younger brother shall not exclude the son of the elder, who died in the life-time of the father. And this was the ancient law of Normandy, but received some interruption in favour of king John's claim. Vide *Coutumier*, cap. 25. & *hic ante*. And indeed, generally, the rule of descents in Normandy, was the same, in most cases, with that of descents with us at this day. As for instance, that the descent of the line of the father shall not resort to that of the mother, *et de conversa*; and that the course was otherwise in cases of purchases. But in most things, the law of Normandy was consonant to the law with us, as it was in the time of king Richard I. and king John; except in cases of descents to *bastard eigne*, excluding *mulier puisne*, as aforesaid (a).

Again, at this day there are many writs now in use which were anciently also in use here, as well as in Normandy. As writ of right, writs of dower, writs *de novel disseisin*, *de mortdancestor*, *juria utrum*, *darrein presentment*, &c. And some that are now out of use, though anciently in use here in England. As writs *de feodo vel vadio*, *de feoda vel warda*, &c. All which are taken notice of by Glanville, lib. 13. cap. 27, 28, 29. And the very same form of writs in effect were in use in Normandy, as appears by the *Coutumier*, *per totum*.—And the writ *de feodo vel vadio* (*ibid.* cap. 11.) according to Glanville, lib. 13. cap. 27. runs thus, viz. “ Rex vicecomiti salutem: summone per bonos summonitores duodecim liberos & legales homines de vicineto quod sint coram me vel justiciis meis eo die parati sacramento recognoscere utrum N. teneat unam carucatam terræ in illa villa, quæ R. clamat versus eum per breve meum in feodo an in vadio invadiatam ei ab ipso R. vel ab H. antecessore ejus, vel aliter si sit feodam vel hæreditas ipsius N. an in vadio invadiata ei ab ipso R. vel ab H. &c. et interim terram illam videant, &c.” Vide *ibid.*

And according to the *Grand Coutumier*, that writ runs thus, viz. “ Si rex fecerit te securum de clamore suo prosequend’ summoneas recognitores de vicineto quod sint ad primas assisas ballivæ, ad cognoscendum utrum carucata terræ in B. quod G. deforceat R. sit feodum tenentis vel vadium novum dictum per manus G. post coronationem regis Richardi & pro quanta, &

(a) As to *bastard eigne* and *mulier puisne*, see Glanv. l. 7. c. 1. Lit. sect. 2 v. 248. 399, 400. Co. Lit. 244.—For a concise explication of the terms, see Blac. Com.

"*utrum sit propinquior hæres ad redimendum vadium, & videatur interim terræ, &c.*" So that there seems little variance, either in the nature, or in the form of those writs, used here in the time of Henry II. and those used in Normandy when the *Contumier* was made.

Again, the use was in England, to limit certain NOTABLE times, within the compass of which those titles which men designed to be relieved upon, must accrue. Thus it was done in the time of Henry III. by the statute of Merton, cap. 8—At which time the limitation in a writ of right was from the time of king Henry I.—and by that statute it is reduced to the time of king Henry II.—And for assizes of Mortdancestor, they were thereby reduced from the last return of king John out of Ireland; which was 12. *Johannis*.—And for assizes of novel disseisin, *à primâ transfretatione regis in Normanniam*; which was 5 Hen. III.—and which before that, had been *post ultimum redditum Henrici III. de Britannia*, as appears by Bracton. And this time of limitation was also afterwards, by the statutes of Westm. 1. cap. 39. and West. 2. cap. 2. 46. reduced unto a narrow scantlet, the writ of right being limited to the first coronation of king Richard I.

But before the limitation set by that statute of Merton, there were several limitations set for several writs. For we find among the pleas of king John's time, the limitation of writs, *de tempore quo rex Henricus avus noster fuit vivus & mortuus*. And in a writ of assize, *die quo rex Henricus obiit* in the time of Henry II. as appears by Glanville, lib. 13. cap. 3.—There were then divers limitations in use, as in Mortdancestor, *post primam coronationem nostram, viz. Henrici secundi*, Glanvil. lib. 1. cap. 1.—And touching assizes of novel disseisin, vide ibid. cap. 32. where he tells us, *cum quis intra assisam, &c.* And the time of limitation in an assize was then *post ultimam meam transfretationem* (viz. *Henrici primi*) *in Normanniam*, lib. 13. cap. 33. But in a writ of right, as also in a writ of customs and services, it was *de tempore regis Henrici avi mei*, viz. Henry I. Vide ib. lib. 12. cap. 10. 16.—And it seems very apparent, that the limitations anciently in Normandy, for all actions ancestral, was *post primam coronationem regis Henrici secundi*, as appears expressly in the *Contumier*, cap. 111. *De Feofe & Gage*.

So that anciently, the time of limitation in Normandy, was the same as in England, and indeed borrowed from England; viz. in all actions ancestral, from the coronation of Henry II. and

thus, in those actions wherein the limitation was anciently from the coronation of king Richard I. was substituted. As in the writ *de feofe & gage*, in the *Coutumier*, cap. 111. *de feofe & forme*, cap. 112. in the writ *de ley apparisan*, ib. cap. 24. & cap. 22. "Ascun gage ne peut estre requise en Normandy, si il ne fuit engage post le coronement de roy Richard ou deins quarante annus." So that the old limitation, as well for the redemption of mortgages, as for bringing those writs above-mentioned, was post coronationem regis Henrici secundi; but altered, as it seems, by king Philip, the son of Lewis king of France, after king John's ejectment out of Normandy. And since the time from the coronation of king Richard I. is estimated to bear proportion to forty years, it is probable this change of the limitation by king Philip of France, was about the beginning of the reign of king Henry III.—or about thirty or forty years after the coronation of Richard I.—from whose coronation about thirty years were elapsed; 5 aut 6 Henrici III. for anciently the limitation in this case was thirty years.

Fourthly, I now come to the fourth enquiry, viz. how this great parity between the laws of England and Normandy came to be affected. And before I come to it, I shall premise two observables,—which I would have the reader to carry along with him through the whole discourse, viz.—First, that this parity of laws does not at all infer a necessity, that they should be imposed by the Conqueror, which is sufficiently shewn in the foregoing chapters; and in this it will appear, that there were divers other means that caused a similitude of both laws, without any supposition of imposing them by the Conqueror. Secondly, that the laws of Normandy were, in the greater part thereof, borrowed from ours, rather than ours from them; and the similitude of the laws of both countries, did in a greater measure, arise from their imitation of our laws, rather than from our imitation of theirs. Though there can't be denied, but that a reciprocal imitation of each other's laws was, in some measure at least, had in both dominions. And these two things being premised, I descend to the means whereby this parity, or similitude of the laws of both countries, did arise, as follow, viz.

First, Mr. Camden, and some others, have thought, there was ever some congruity between the ancient customs of this island and those of the country of France, both in matters religious and civil; and tells us of the ancient Druids, who were THE COMMON

INSTRUCTORS OF BOTH COUNTRIES (a): *Gallia caudicos docuit facunda Britannos*. And some have thought, that anciently, both countries were conjoined by a small neck of land, which might make an easier transition of the customs of either country to the other. But those things are too remote conjectures, and we need them not to solve the congruity of laws between England and Normandy. Therefore,

Secondly, it seems plain, that before the Normans coming in, in way of hostility, there was a great intercourse of commerce and trade, and a mutual communication, between those two countries. And the consanguinity between the two princes gave opportunities of several interviews between them and their courts, in each other's countries. And it is evident by history, that the Confessor, before his accession to the crown, made a long stay in Normandy, and was there often; which of consequence must have drawn many of the English thither, and of the Normans hither. All which might be a means of their mutual understanding of the customs and laws of each other's country; and gave opportunities of incorporating and ingrafting divers of them into each other, as they were found useful or convenient. And therefore, the author of the Prologue to the *Grand Coutumier*, thinks it more probable, that the laws of Normandy were derived from England, than that ours were derived from thence.

Thirdly, it is evident, that when the duke of Normandy came in; he brought over a great multitude, not only of ordinary soldiers, but of the best of the nobility and gentry of Normandy. Hither they brought their families, language, and customs, and

(a) The Druids, of whom much notice has been taken by historians, have been represented by some, as persons of learning, derived to them by long tradition. They were respected and admired, not only for knowing more than others, but for despising what all others valued and pursued.—By their virtue and their temperance, they reprov'd and corrected those vices in others, from which they were themselves happily free; and made use of no other arms, than the reverence due to integrity, to enforce obedience to their own commands. Hence they derived so much authority, that they

were not only priests, but judges:—no laws were instituted without their approbation; nor any person punished, but by their condemnation. The druidical hierarchy, and the several institutions peculiar to that priesthood, do not appear to have been settled in any part of Europe, except in the British isles and in Gaul.—According to Cæsar, whose testimony cannot be disputed, Gaul received it from Britain. See Dr. Borlase's *Observations on the Antiquities of Cornwall*, cap. 3, 4, 5, 6. and Rowland's *Mona Antiquæ Restituta*, the second ed. by Dr. Owen.

the victor used all his art and industry to incorporate them into this kingdom. And the more effectually to make both people become one nation, he made marriages between the English and Normans;—transplanting many Norman families hither, and many English families thither.—He kept his court sometimes here and sometimes there; and by those means insensibly derived many Norman customs hither, and English customs thither, without any severe imposition of laws on the English, as conqueror. And by this method he might easily prevail to bring in, even without the people's consent, some customs and laws, that perhaps were of foreign growth; which might the more easily be done, considering how, in a short time, the people of both nations were intermingled.—They were mingled in marriages, in families, in the church, in the state, in the court, and in councils; yea, and in parliaments, in both dominions.—Though Normandy became, as it were, an appendix to England, which was the nobler dominion, and received a greater conformity of their laws to the English, than they gave to it.

Fourthly, but the greatest mean of the assimilation of the laws of both kingdoms was this. The kings of England continued dukes of Normandy till king John's time, and he kept some footing there, notwithstanding the confiscation thereof by the king of France, as aforesaid. And during all this time, England, which was AN ABSOLUTE MONARCHY (a), had the prelation, or preference, before Normandy, which was but a FEUDAL DUCHY, and a small thing in respect of England.—By this means Normandy became, as it were, an appendant to England; and successively received its laws and government from England; which had a greater influence on Normandy, than THAT could have on England. Insomuch that oftentimes there issued precepts into Normandy, to summon persons there to answer in civil causes here; yea, even for lands and possessions in Normandy. As *placito 1 Johannis*—a precept issued to the seneschal of Normandy, to summon Robert Jeronymus, to answer to John Marshal, in a plea of land, giving him forty days warning; to which the tenant appeared, and pleaded a recovery in Normandy. The like precept issued, for William de Bosco, against Jeffry Rusham, for lands in Corbespine in Normandy.

(a) Hale, cannot mean, that England was an absolute monarchy, in the common use of the term. He means no more than what Bracton says, that the king of England is under no one—save God and the law.

And on the other side, *Trim. 14 Johannis*, in a suit between Francis Borne and Thomas Adorne, for certain lands in Ford, the defendant pleaded a concord made in Normandy, in the time of king Richard I. upon a suit there before the king, for the honour of Bonn in Normandy, and for certain lands in England, whereof the lands in question were parcel, before the seneschal of Normandy, *anno 1099*. But it was excepted against, as an insufficient fine, and varying in form from other fines; and therefore the defendant relied upon it as a release.

By these, and many the like instances, it appears as follows, viz.

First, that there was a great intercourse between England and Normandy, before and after the Conqueror; which might give a great opportunity of an assimilation and conformity of the laws in both countries. Secondly, that a much greater conformation of laws arose AFTER the Conqueror, during the time that Normandy was enjoyed by the crown of England, than before. And thirdly, that this similitude of the laws of England and Normandy, was not by conformation of the laws of England to those of Normandy, but by conformation of the laws of Normandy to those of England,—which now grew to a great height, perfection, and glory. So that Normandy became but a perquisite, or appendant, of it.

And as the reason of the thing speaks it, so the very fact itself attests it: for—

First, it is apparent, that in point of limitation in actions ancestral, from the time of the coronation of king Henry II. it was anciently so here in England in Glanville's time, and was transmitted from hence into Normandy. For it is no way reasonable to suppose, the contrary, since Glanville mentions it to be enacted here *concilio procerum*. And though this be but a single point, or instance, yet the evidence thereof makes out a criterion, or probable indication, that many other laws were in like manner sent hence into Normandy.

Secondly, it appears, that in the succession of the kings of England, from king William I. to king Henry II. the laws of England received a great improvement and perfection, as will plainly appear from Glanville's book written in the time of king Henry II. especially if compared with those sums, or collections, of laws, either of Edward the Confessor, William I. or Henry I. whereof hereafter.

So that it seems, by use, practice, commerce, study, and improvement of the English people, they arrived in Henry the second's time, to a greater improvement of the laws; and that in the time of king Richard I. and king John, they were more perfected, as may be seen in the pleadings, especially of king John's time; and though far inferior to those of the times of succeeding kings, yet they are far more regular and perfect than those that went before them. And now, if any do but compare the *Coutumier* of Normandy, with the tract of Glanville, he will plainly find that the Norman tract of laws, followed the pattern of Glanville, and was writ LONG AFTER it, when possibly the English laws were yet more refined and more perfect. For it is plain beyond contradiction, that the collection of the customs and laws of Normandy was made after the time of king Henry II.—for it mentions his coronation, and appoints it for the limitation of actions ancestral,—which must at least have been thirty years after. Nay, the *Coutumier* appears to have been made after the act of settlement of Normandy in the crown of France; for therein is specified the institution of Philip king of France, for appointing the coronation of king Richard I. for the limitation of actions, which was AFTER the said Philip's full possession of Normandy.

Indeed, if those laws and customs of Normandy, had been a collection of the laws they had had there, BEFORE the coming-in of king William I. it might have been a probability that their laws, being so near like ours, might have been transplanted from thence thither. But the case is visibly otherwise. For the *Coutumier* is a collection AFTER the time of king Richard I.—yes, after the time of king John, and POSSIBLY AFTER Henry the third's time; when it had received several repairings, amendments, and polishings, under the several kings of England, William I. William II. Henry I. king Stephen, Henry II. Richard I. and king John; who were either knowing themselves in the laws of England, or were assisted with a council that were knowing therein.

And, as in this tract of time, the laws of England received a great advance and perfection, as appears by that excellent collection of Glanville, written even in Henry the second's time (a), when yet there were near thirty years to acquire unto a further

(a) Vido cap. vii.

improvement before Normandy was lost; so from the laws of England, thus modelled, polished, and perfected, the same draughts were drawn upon the laws of Normandy; which received the fairest lines from the laws of England, as they stood at least in the beginning of king John's time; and were in effect, in a great measure, the defloration of the English laws, and a transcript of them; though mingled and interlarded with many particular laws and customs of their own, which altered the features of the original in many points.

CHAP. VII.

Tracing the progress of the laws of England, after the time of king William I. until the time of king Edward II.

which precedes in the two foregoing chapters, gives us account of the laws of England, as they stood in and after GREAT CHANGE which happened under king William I. only called the Conqueror. I shall now proceed to the thereof in the ensuing times, until the reign of king Edward I. (a)

William I. having three sons,—Robert the eldest, William Rufus, and Henry the youngest, disposed of the crown of England to William his second son (b), and the duchy of Normandy to Robert (c), his eldest son. And accordingly William II. only called William Rufus, succeeded his father in this manner. We have little memorable of him in relation to laws, only that he severely pressed and extended the forest

Henry I. son of William I. and brother of William II. succeeded his said brother in the kingdom of England, and afterwards expelled his eldest brother Robert out of the duchy of Normandy also. He proceeded much in the benefit of the laws, viz.

In the last chapter of Mr. Jus-
tice Blackstone's Commentaries on
the progress, and gradual im-
provements of the laws of England:
"William the conqueror, in his
will, wrote to Lanfranc, arch-
bishop of Canterbury, desiring him to
advise William, his second son, king
and. Gul. Geinet. p. 292.
ital. p. 659. Chron de Mailr.
Malmes. p. 112. H. Hunt.
Doveden, p. 460. M. Westm.
But see Lord Lyttelton's Hist.
1 v. oct. 75. The three suc-
cessors of the Conqueror—William,
and Stephen, in the estimation
were no better than usurpers;

they certainly reigned with disputed titles.

(c) He left him Normandy and Maine, and bequeathed to Henry nothing but the possessions of his mother Matilda; but foretold, that he would, one day, surpass both his brothers in power and opulence. Order. Vital. 659. Gul. Neustr. 357. Fragm. de Gul. Conq. 32.

(d) Henry executed justice, and that with rigour; the best maxim which a prince in that age could follow. Stealing was first made capital in this reign; and false coining, which was then a very common crime, and by which the money had been extremely debased,

First, he restored the free election of bishops and abbots, which before that time he and his predecessors invested *per annuum & baculum*; yet reserving those three ensigns of the patronage thereof, viz. *conge d' eslire*, custody of the temporalities, and homage upon their restitution. Vide Hoveden, *in vitâ suâ*.

But secondly, the great essay he made, was the composing an abstract or manual of laws, wherein he confirmed the laws of Edward the Confessor, "cum illis emendationibus quibus eam" "pater meus emendavit baronum suorum concilio;" and then adds his own laws, some whereof seem to taste of the canon law (a). The whole collection is transcribed in the Red Book of the exchequer; from whence it is now printed in the end of Lambard's Saxon Laws, and therefore not needful to be here repeated (b).

They, for the most part, contain a model of proceedings in the county courts, the hundred courts, and the courts leet; the former to be held twelve times in the year, the latter twice; and also of the courts baron. These were the ordinary usual courts, wherein justice was then, and for a long time after, most commonly administered.—Also they concern criminal proceedings, and the punishment of crimes, and some few things touching civil actions and interests; as in chapter 70, directing descents, viz.

"Si quis sine liberis decesserit pater aut mater ejus in hæreditatem succedant, vel frater vel soror, si pater & mater desint; si nec hos habeat, frater vel soror patris vel matris; & deinceps in quantum genetalium, qui cum propiores in parentela sint hæreditario jure succedant; et dum virilis sexus extiterit & hæreditas abinde sit femina non hæreditetur; primum patris feodum primogenitus filius habeat. Emptiones vero & deinceps acquisitiones det cui magis velit, sed si Bockland (c) habeat quam ei parentes dederint mittat eam extra cognationem suam." (d)

I have observed and inserted this law, for two reasons, viz.

was severely punished by Henry. Sim. Dunelm. 231. Brompton, 1000. Flor. Wigorn. 653. Hoveden, 471. Annal. Waverl. 149.

(a) There is a code which passes under the name of Henry I. but the best antiquaries have agreed not to think it genuine. It is, however, a very ancient compilation, and may be useful to instruct us in the manners and customs of the times. We learn from it, that a great distinction was then made between the English and Normans,

much to the advantage of the latter. LL. Hen. I. sec. 18. 75. Hallam's View, 2 v. c. 8.

(b) Lamb. Arch. 175. Wilk. Leges Ang. Sax. 233.

(c) Charter-land. Those were free from all services, common among the Saxons, not holden of any lord—devisable by will, and descendible to all the sons, as in gavel kind. Spelm. of feuds, 12.

(d) Blac. Com. 4 v. 421.

First, to justify what I before said, that the laws of Normandy took the English laws for their pattern in many things. Vide *Le Coutumier*, cap. 25, 26, 36, &c. And secondly, to see how much the laws of England grew and increased in their particularity and application, between this time and the laws of William I.;—which in chapter 36, has no more touching descents than this, viz.—“*Si quis intestatus obierit, liberi ejus hæreditatem equaliter dividant.*” (a) But process of time grafted thereupon, and made particular provisions for particular cases, and added distinctions and subdivisions to those general rules.

These laws of king Henry I. are a kind of miscellany, made up of those ancient laws called the laws of the Confessor and king William I. and of certain parts of the canon and civil law, and of other provisions, that custom and the prudence of the king and council had thought upon, chosen, and put together.

King Stephen succeeded, BY WAY OF USURPATION, upon Maud, the sole daughter and heir of king Henry I (b).

The laws of Henry I. grew tedious and ungrateful to the people, partly because new, and so not so well known; and partly because more difficult and severe than those ancient laws called the Confessor's. For Walsingham, in his *Ypodigma Neustriæ*, tells us, that the Londoners petitioned queen Maud, “*ut liceret eis uti legibus sancti Edvardi & non legibus patris sui Henrici, quia graves erant*” (c); and that her refusal gave occasion to their defection from her, and strengthened Stephen in his usurpation; who according to the method of usurpers, to secure himself

(a) Which *in terminis*, is the Saxon law. Can. c. 68. W. l. c. 36.

(b) Matilda, or, as Hale calls her, Maud, was the only legitimate issue of Henry I. and whom he betrothed to the emperor Henry V. but he dying without issue, Henry bestowed her on Geoffrey, the eldest son of Fulk, count of Anjou. Though Henry by his will left his daughter Matilda all his dominions, yet, independent of that disposition, she was most unquestionably heir to the kingdom of England. In the progress and settlement of the feudal law, the male succession to fiefs had taken place some time before the female was admitted: and estates being considered as military benefices, not as property, were transmitted to such only as could serve in the armies, and

perform in person, the conditions upon which they were originally granted. But after that, the continuance of rights, during some generations, in the same family, had, in some measure, obliterated the primitive idea, the females were gradually admitted to the possession of feudal property; and the same revolution of principles which procured them the inheritance of private estates, naturally introduced their succession to government and authority. The failure, therefore, of male heirs to the kingdom of England and duchy of Normandy, seemed to leave the succession open, without a rival, to Matilda. See Lord Lyt. Hist. Hen. II. 1 v. oct. 231. seq.

(c) Contin. Flor. Wig. 677. Ger-vase, 1355.

on the throne, was willing and ready to gratify the desires of the people herein. He furthermore took his oath, that he would not retain in his hands the temporalities of the bishops; that he would remit the severity of the forest laws; and that he would also remit the tribute of Danegelt (A). But he performed nothing.

His times were troublesome. He did little in relation to the laws. Nor have we any memorial of any record touching his

(A) When the invasions of the Danes were frequent and formidable, it was customary either to bribe them to desist from depredation, or to maintain a considerable body of troops to defend the coasts against those dangerous enemies. The ordinary revenues of the crown being inadequate to the expense, it became necessary, with consent of the Witenagemote, to impose a tax, first of one Saxon shilling, afterwards of two or more, on every hide of land in the kingdom. As there were 243,600 hides of land in England, this tax, at one shilling on each hide, raised 12,180 Saxon pounds; equal in quantity of silver, to about 36,540 pounds sterling, and in efficacy, to more than 360,000 pounds of our money at present. This tax seems to have been first imposed A. D. 991, and was called Danegeld, or the Danish tax of payment.* It was soon after raised to two, at last to seven shillings on every hide of land, and continued to be levied long after the original occasion of imposing it had ceased. While the invasions of the Danes were almost annual, our kings derived little profit from this tax; but after the accession of the Danish princes to the throne of England, it became one of the chief branches of the royal revenue. It was raised so high, and collected with so much severity, by Canute, A. D. 1018, that it amounted to the prodigious sum of 71,000 Saxon pounds, besides 11,000 of the same pounds paid by the city of London.† It appears, however, from very good authority, that this was too great a sum for England to pay in one year, at that time. "The tribute (says an Author of those times, preserved by Mr. Leland) that was paid annually by the English to the Danes, was at length raised to 72,000 pounds and more, besides 11,000 pounds paid by the City of London. Those who had money to pay their proportion of this grievous tax, paid it; but those who had not money, irrecoverably lost their lands and possessions. The church of Peterborough, and several other churches, sustained great losses on that occasion."‡ From these accounts it is evident, that this tax had been gradually raised from one shilling to seven shillings on each hide of land. It was afterwards reduced to four shillings on each hide; at which rate it seems to have continued till it was finally abolished. It was remitted in the reign of Henry the second. Houses in towns were subjected to this tax: an house of a certain value paid the same as a hide of land.§ It is said to have been the first tax known in England—and was the ship-money of those times. After the conquest this tax is said to have been only occasionally required: and the latest instance on record of its payment is, in the 20th of Hen. II. Its imposition seems to have been at the king's discretion. *Lyt. Hen. II. 2 v. p. 170.*

* *Chron. Saxon. 126, 128. LL. Edw.*

‡ *Leland's Collectanea, 1 v. 11.*

† *Id. p. 151.*

§ *Hen. Hist. 2 v. 260.*

things therein, only there are some few pipe rolls of his relating to the revenue of the crown (a).

ry II. the son of Maud, succeeded Stephen. He reigned ~~in~~ about thirty-five years. And though he was not without troubles and difficulties, yet he built up the laws and unity of the kingdom to a great height and perfection (b).

t, in the entrance of his government, he settled the peace kingdom (c). He also reformed the coin (d), which was adulterated and debased in the times and troubles of king

he advancement of Stephen to the throne procured him neither tranquillity nor happiness; and though the state of England, prevented the usurping States from taking any advantage of her confusions, intestine disorders were to the realm ruinous and destructive. The art of Rome, during these disturbances, was permitted to make farther progress in her usurpations; and against the pope, which had been strictly prohibited by the Emperors, became now common in ecclesiastical controversy. H. 1155. In this turbulent reign, the sects of Justinian were brought in from Rome, by some of the advocates of archbishop Theobald. A prior of Bec, read lectures on them to very crowded audiences. *Aburien*. l. 8. c. 22. p. 672. Opposition, however, was made to the introduction of those laws.—*Salisbury* tells us, that he had seen, who were so much enraged against them, that whenever they met a copy of the Roman law, they tore it in pieces, or threw it into the fire. Stephen, out of hatred to archbishop, joined in this opposition even published an edict, imposing silence on Vacarius, and prohibiting any one to read the books of the law; but it did not answer the purpose which it was intended. *Selden*. *Ulpian*, c. 7. From this reign, therefore, we are to date the introduction of the Roman civil and canon laws into the realm. *Blac. Com.* 4 v. 421. He was, perhaps, the greatest of his time, for wisdom, virtue, and ability—his character, both in public and in private life, being almost

without a blemish. He possessed every accomplishment, both of body and mind, which makes a man either estimable or amiable. He occupied himself for several years in the administration of justice, in the execution of the laws, and in guarding against those inconveniences, which either the past convulsions of his state, or the political institutions of that age, unavoidably occasioned. The provisions which he made, shew such a largeness of thought as qualified him to become a legislator; and they were commonly calculated for the future, as well as for the present happiness of his kingdom. His exactness in administering justice had gained him so great a reputation, that even foreign and distant princes made him an arbiter, and submitted their differences to his judgment. *Rymer*, vol. iv. 43. *Bened. Abb.* 172. *Diceto*, 597. *Brompton*, 1120. See his *History* and of the age in which he lived, by lord Lyttleton; an elaborate work, enriched with illustrations of the ancient laws and constitution of England.

(c) The title of Henry the second to the crown was more unexceptionable than those of his three predecessors; he nevertheless thought it prudent, on his accession, to conciliate the affections of his subjects, by granting them a charter, confirming one which had been before granted by his grandfather Henry the first. *Blac. Law Tr.* 2 v. p. 11.

(d) He repaired the coin, which had been extremely debased during the reign of his predecessor; and took proper measures against the return of like abuses. *Hoveden*, 491.

Stephen; "et leges Henrici avi sui præcepit per totum regnum "inviolabiliter observari." Hoveden.

Secondly, against the insolences and usurpations of the clergy, he by the advice of his council or parliament, at Clarendon, enacted those sixteen articles mentioned by Mat. Paris, *sub anno* 1164. They are long, and therefore I remit you thither for the particulars of them (B).

(B) About the middle of the twelfth century, the ecclesiastics, having renounced all immediate subordination to the civil magistrate, openly pretended to an exemption, in criminal accusations, from a trial before courts of justice; and were gradually introducing a like exemption in civil causes: in fact, *MOLY ORDERS WERE BECOME A FULL PROTECTION FOR ALL ENORMITIES.**

Henry II. therefore deeming it necessary to define with precision the exact boundaries of the civil and ecclesiastical jurisdictions, on the 25th of January 1164, summoned a general council of the nobility and prelates at Clarendon, to whom he submitted the important question.

After great contention between the temporal barons and the bishops, they at length adjusted, and signed, a charter, or code of laws, called the Constitutions of Clarendon: sixteen of its articles related particularly to ecclesiastical matters, whereof the ten following were the most contradictory to the pretensions of the clergy and the see of Rome.

First, if any dispute shall arise concerning the advowson and presentation of churches, between laymen, or between ecclesiastics and laymen, or between ecclesiastics, let it be determined in the court of our lord the king.†

Secondly, ecclesiastics arraigned and accused of any matter, being summoned by the king's justiciary, shall come into *his* court, to answer there, concerning that which, it shall appear to the king's court, is cognizable there; and shall answer in the ecclesiastical court, concerning that which, it shall appear, is cognizable there; so that the king's justiciary shall send to the court of holy church, to see in what manner the cause shall be tried there: and if an ecclesiastic shall be convicted, or confess the crime, the Church ought not any longer to give him protection.

* It is not easy to fix with precision when the ecclesiastics first began to claim exemption from the civil jurisdiction. It is certain, that during the early and purest ages of the Church, they pretended to no such immunity. Then the authority of the civil magistrate extended to all persons, and to all causes. What was at first an act of complaisance, flowing from veneration for their character, was in process of time, improved into exemption. Du Cange, in his Glossary, *voc. Curia Christianitatis*, has collected most of the causes with respect to which the clergy arrogated an exclusive jurisdiction; and refers to the authors, or original papers, which confirm his observations. Giannone, in his Civil History of Naples, lib. 19. sect. 3.

has ranged these under proper heads, and scrutinizes the pretensions of the Church with boldness and discernment.

† Before the establishment of the spiritual court in England, rights of advowson were tried in the county courts, where the presence of the king's officer and other lay assistants, prevented partial and unjust decisions by the ecclesiastical judge. But after the separation of the ecclesiastical and civil jurisdictions by William the conqueror, the clergy endeavoured to draw all causes of this nature into the spiritual court, which was very presently resisted by the civil power in those days, and the trial thereof reserved to the king's supreme court. *Id. Lytt. Hist. Henry II. vol. 4. oct. 371.*

'Tis true, Thomas Becket, archbishop of Canterbury, boldly and **INSOLENTLY** took upon him to declare many of those articles

Thirdly, it is *unlawful* for archbishops, bishops, and *any dignified clergymen of the realm*, to go out of the realm without the king's licence; and if they shall go, they shall, if it so please the king, give security, that they will not, either in going, staying, or returning, procure any evil, or damage, to the king, or the kingdom.*

Fourthly, persons excommunicated ought not to give any security by way of deposit, nor take any oath, but only find security and pledge to stand to the judgment of the Church, in order to absolution.†

Fifthly, no tenant *IN CHIEF* of the king, nor any of the officers of his household, or of his demesne, shall be excommunicate, nor shall the lands of any of them be put under an interdict; unless application shall first have been made to our lord the king, if he be in the kingdom; or, if he be out of the kingdom, to his justiciary; that he may do right concerning such person; and in such manner, as that what shall belong to the king's court shall be there determined, and what shall belong to the ecclesiastical court shall be sent thither, that it may be there determined.‡

Sixthly, concerning appeals, if any shall arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop. And, if the archbishop shall fail in doing justice, the cause shall at last be brought to our lord the king, that by his precept the dispute may be determined in the archbishop's court; so that it ought not to proceed any further without the consent of our lord the king.§

* This was enacted to prevent the too frequent and dangerous intercourse between the pope and English prelates. The words in the original constitution, *personæ regni*, should be translated *DIGNIFIED* clergymen. Vide *Titles of Honour*, 732. It takes in all clergymen who held of him *in chief*, but does not here extend to all parsons or beneficed clergymen, as the word is commonly translated.

† The words in the original are, "non debent dare vadium ad remanens," which being somewhat obscure, have been differently translated by different authors.

‡ One reason assigned for this, by the authors of those times, is, that the king should not ignorantly be exposed to converse with an excommunicated person; to prevent which, notice to the king would have been sufficient; whereas the constitution itself declares the intention to be, that the king may do right concerning such person. And it not only secures the persons of the king's tenants and officers from excommunication, but also their lands from an interdict, without application to him. In truth, it was meant as a check upon the power of the spiritual court, and, as appears from Eadmer, was coeval with the establish-

ment of that court in England. Yet the latter part of it shews, that it did not take from thence all power of inflicting the discipline of the church on scandalous sinners, because they held of the king, or served him as his officers; but only prevented the exercise of that jurisdiction over his tenants, and officers, without a reasonable cause, or in cases not properly cognizable there, but belonging to his courts of civil or criminal justice. The only fault of this law seems to have been the limitation of it, in making that a privilege of one class of the people, which was a right due to all. *Ibid.* 372.

§ In a letter of the bishop of London to the pope, concerning the dispute between the king and Becket, he explains this constitution as being no prohibition of appeals to Rome, but only a check on their being carried thither unnecessarily, and without the leave of the king. His words are, "In appellationibus ex antiqua regni sui consuetudine id sibi vindicat (rex scilicet) honoris et oneris, ut ob civilem causam ullus clericorum regni sui ejusdem regni fines exeat, nisi, an ipsius autoritate et mandato jus suum obtinere queat, expediendo cognoscat. Quod si nec sic obtinerit, ad excellentiam vestram, ipso in

void ; especially those five mentioned in his epistle to his suffragans, recorded by Hoveden ; viz. first, that there should be no

Seventhly, if there shall arise any dispute between an ecclesiastic and a layman, or between a layman and ecclesiastic, *about any tenement*, which the ecclesiastic pretends to be held in *frank almoigne*, and the layman pretends to be a *lay fee*, it shall be determined before the king's chief justice, *by the trial of twelve lawful men*, whether the tenement belongs to frank almoigne, or is a lay fee ; and if it be found to be frank almoigne, then it shall be pleaded in the ecclesiastical court ; but if a lay fee, then in the king's court ; unless both parties shall claim to hold under the same bishop or baron ; but if both shall claim to hold the said fee under the same bishop or baron, the plea shall be in *his* court ; provided that by reason of such trial, the party who was first seised shall not lose his seising till it shall have been finally determined by the plea.

Eighthly, whosoever is of any city, or castle, or borough, or demesne manor, *of our lord the king*, if he shall be cited by the archdeacon or bishop for any offence, and shall refuse to answer to such citation, it is allowable to put him under an interdict ; but he ought not to be excommunicated, before the king's chief officer of the town be applied to, that he may by due course of law compel him to answer accordingly ; and if the king's officer shall fail therein, such officer shall be at the mercy of our lord the king ; and then the bishop may compel the person accused by ecclesiastical justice.

Ninthly, pleas of debt, whether they be due by faith solemnly pledged, or without faith so pledged, belong to the king's judicature.*

Tenthly, when an archbishoprick, or bishoprick, or abbey, or priory, *of royal foundation*, shall be vacant, it ought to be in the hands of our lord the king, and he shall receive all the rents and issues thereof, as of his demesne ; and when that church is to be supplied, our lord the king ought to send for the principal clergy of that church, and the election ought to be made in the king's chapel, with the assent of our lord the king, and the advice of such of the prelates of the kingdom as he shall call for that purpose ; and the person elect shall there do homage and fealty to our lord the king, as his liege lord, of life, limb, and worldly honour, (*SAVING HIS ORDER*) before he be consecrated.†

" nullo reclamante, cum volet quilibet appellabit." Without question there is not in the words of this constitution any direct prohibition of appeals to Rome ; it being only declared, that, upon an appeal from the archdeacon, the cause ought not to proceed any further than the archbishop's court, without consent of the king. But in effect this restraint would generally have stopped the cause in that court ; and it manifestly asserted the royal supremacy, by subjecting the power of appealing to Rome, in ecclesiastical causes, to the will and pleasure of the king ; whereas the pope claimed the right of receiving such appeals, as inherent in his see. Henry's desire of gaining the consent of the bishops to this constitution, was the reason of his avoiding an express prohibition ; but he intended it

should have the same operation, and the pope saw that intent. Ibid. 373.

* The clergy of England began first in the reign of king Stephen, to extend their jurisdiction in the spiritual courts, to the trial of persons for breach of faith, *pro lesione fidei*, in civil contracts ; by which means they drew thither a vast number of causes which belonged to the civil courts, and of which they had no cognizance. To this encroachment they were instigated by the bishops of Rome, therefore Alexander condemned the above recited statute which was made to prevent it.

† The saving clause at the end certainly opened a wide door to elude all the obligations contracted by the prelates in the act of homage and oath of fealty ; though it is affirmed by Becket, in a letter to the pope,

appeal to the bishop without the king's licence. Secondly, that no archbishop or bishop should go over the seas, at the pope's

The king, thinking that he had now finally prevailed in this great enterprise, sent the constitutions to pope Alexander, requiring his ratification; but Alexander, who plainly saw that they were calculated to establish the *independence* of England, absolutely condemned, in the strongest terms, the ten articles above recited, and only ratified the following six, viz.

1. Churches belonging to the fee of our lord the king cannot be given away in perpetuity, without the consent and grant of the king.

2. Laymen ought not to be accused, unless by certain and legal accusers and witnesses, in the presence of the bishop, so as that the archdeacon may not lose his right, nor any thing which should thereby accrue to him: and if the offending persons be such, as that none will or dare accuse them, the sheriff, being thereto required by the bishop, shall swear twelve lawful men of the vicinage, or town, before the bishop, to declare the truth, according to their conscience.

3. Archbishops, bishops, and all dignified clergmen, who hold of the king in chief, have their possessions from the king *as a barony*, and answer thereupon to the king's justices and officers, and follow and perform all royal customs and rights, and, like other barons, ought to be present at the trials of the king's court with the barons, till the judgment proceeds to loss of members or death.

4. If any nobleman of the realm, shall forcibly resist the archbishop, bishop, or archdeacon, in doing justice upon him or his, the king ought to bring them to justice: and if any shall forcibly resist the king in his judicature, the archbishops, bishops, and archdeacons ought to bring him to justice, that he may make satisfaction to our lord the king.

5. The chattels of those who are under forfeiture to the king, ought not to be detained in any church, or church-yard, against the king's justiciary; because they belong to the king, whether they are found within churches or without.

6. The sons of villains ought not to be ordained, without the consent of their lords, in whose lands they were known to have been born.

A transcript of the Constitutions of Clarendon, from the *Cottonian* manuscript of Becket's life and epistles, which is probably the most ancient and correct copy, is in lord Lyttelton's Life of Henry the Second.

"that the same form was then used by the whole Christian church." He likewise adds, that when his holiness absolved him from an oath which he had taken at Clarendon, that pontiff told him, that "not even for the preservation of his life should a bishop lay himself under any obligation without a *saving* to his order, and to the honour of God:" to which he adhered most pertinaciously. As for the form of election which is laid down in this statute, it must be observed, that the making it, in the king's chapel, by the principal clergy of the vacant church, with the advice only of such of the prelates of the kingdom as he should call for that purpose, seems to have been a practice of no very ancient date; not older than the reign of Henry I. or William Rufus. For Mr. Tyrrel, in the introduction to his History of England, has proved by many authorities, (see Chron. Sax. edit. Oxon. p. 174), that during the times of the Saxons, the English prelates had been usually elected in the Witen-gemote, or great council, with the advice and concurrence of the whole assembly. It likewise appears from the Saxon Chronicle, that the same form was continued under William I. But whatever form had been kept up in those, or was continued in these times, the chief power in the elections, was, by the constitution of the kingdom, assigned to the king.

command, without the king's licence. Thirdly, that the bishop should not excommunicate the king's tenants *in capite*, without the king's licence. Fourthly, that the bishop should not have the conuzance of perjury, or *fidei lacionis*. And, fifthly, that the clergy should be convened before lay judges, and that the king's courts should have conuzance of churches and of tythes.

Thirdly, he raised up the municipal laws of the kingdom to a greater perfection, and a more orderly and regular administration than before. 'Tis true, we have no record of judicial proceedings so ancient as that time, except the PIPE ROLLS in the exchequer, which are only accounts of his revenue. But we need no other evidence hereof, than the tractate of Glanville, which though perhaps it was not written by that Ranulphus de Glanvilla who was *justitiarius Angliæ* under Henry II. yet it seems to be wholly written at that time (a). By that book, though many parts thereof are at this day antiquated and altered, and in that long course of time which has elapsed since that king's reign, much enlarged, reformed, and amended; yet by comparing it with those laws of the Confessor and Conqueror, yea, and the laws of his grandfather king Henry I. which he confirmed, it will easily appear, that the rule and order, as well as the administration of the law, was greatly improved beyond what it was formerly. And we have more footsteps of their agreement and concord herein with the

These statutes were not only enacted by the advice and authority of parliament, but after a strict enquiry into the law and customs of the realm anterior to that time; and which these statutes only revived and confirmed. The preamble says, "in præsentia ejusdem regis facta est ista recordatio vel recognitio cujusdam partis consuetudinum et libertatum et dignitatum antecessorum suorum, videlicet, regis Henrici avi sui et aliorum, quæ observari et teneri debent in regno."

For the political power of the clergy during the middle ages, the student may consult Mr. Hallam's View, c. 7, and the authorities there cited.

(a) Sir Edward Coke (4 Inst. 345.) says, that this book was first printed "by the persuasion and procurement of sir William Stanford, a grave and learned judge of the common pleas, A. D. 1554. 1 & 2 Ph. & M.—" Henricus rex Angliæ pater constituit (says Hoveden) Ranulphum de Glanville summum justic. totius Angliæ, cujus sapientia conditæ sunt leges subscriptæ quas Anglicanus voca-

"mus." Hov. A. D. 1180. et reg. H. 2. 26. Plowd. 368. Sulliv. Lect. 130. 148.; 288.—This book of Glanville (Tractatus de Legibus et Consuetudinibus Angliæ) is supposed to have been the first undertaking of the kind, in any country of Europe. It was composed about the year 1181.—Roberts. Cha. V. 1 v. oct. 382. A translation of Glanville, with notes, was published in 1812, by Mr. Beames.

laws, as they were used from the time of Edward I. and downwards, than can be found in all those obsolete laws of Henry I. which indeed were but disorderly, confused, and general things; rather the cases and shells of directing the way of administration, than institutions of law, if compared with Glanville's tractate of our laws.

Fourthly, the administration of the common justice of the kingdom seems to be wholly dispensed in the county courts, hundred courts, and courts baron; except some of the greater crimes reformed by the laws of king Henry I. and that part thereof which was sometimes taken up by the *justitarius Angliæ*. This doubtless bred great inconvenience, uncertainty, and variety in the laws, viz.

First, by the IGNORANCE of the judges, which were the freeholders of the county. For although the alderman, or chief constable of every hundred, was always to be a man learned in the laws; and although, not only the freeholders, but the bishops, barons, and great men, were by the laws of king Henry I. appointed to attend the county court, yet they seldom attended there; or if they did, in process of time they neglected to study the English laws, as great men usually do.

Secondly, another inconvenience was, that this also bred GREAT VARIETY of laws, especially in the several counties. For the decisions, or judgments, being made by divers courts, and several independent judges and judicatories, who had no common interest among them in their several judicatories; thereby, in process of time, every several county would have several laws, customs, rules, and forms of proceeding;—which is always the effect of several independent judicatories, administered by several judges.

Thirdly, a third inconvenience was, that all the business of any moment was carried by parties and factions. For the freeholders being generally the judges, and conversing one among another, and being as it were the chief judges, not only of the fact but of the law; EVERY MAN THAT HAD A SUIT THERE, SPED ACCORDING AS HE COULD MAKE PARTIES. And men of great power and interest in the county, did easily overhear others, in their own causes, or in such wherein they were interested; either by relation of kindred, tenure, service, dependance, or application.

And although in cases of false judgment, the law, even as then used, provided a remedy, by writ of false judgment, before the king or his chief justice; and in case the judgment was found to be such, in the county court, all the suitors were considerably amerced; which also continued long after in use with some severity; yet this proved but an *INEFFECTUAL* remedy for those mischiefs.

Therefore the king took another and a more effectual course. For in the twenty-second year of his reign (*a*), by advice of his parliament held at Northampton, HE INSTITUTED JUSTICES ITINERANT (*b*); dividing the kingdom into six circuits, and to every circuit allotting three judges, knowing or experienced in the laws of the realm (*c*). These justices with their several circuits are declared by Hoveden, *sub eodem anno*; i. e. 22 H. 2. viz.

“ 1. Hugo Cressy, Walterus filius Roberti, & Robertus Maunsel, for Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex, and Hartford counties.

“ 2. Hugo de Gundevilla, W. filius Radulphi, & W. Basset, for Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, and Leicester counties.

“ 3. Robertus filius Bernardi, Richardus Giffard, & Rogerus filius Ramfrey, for Kent, Surrey, Sussex, Hampshire, Berks, and Oxon counties.

“ 4. W. filius Stephani, Bertein de Verdun, & Turstavi filius Simonis, for Hereford, Gloucester, Worcester, and Salop counties.

“ 5. Radulphus filius Stephani, W. Ruffus, & Gilbertus Pipard, for the counties of Wilts, Dorset, Somerset, Devon, and Cornwall.

“ 6. Robertus de Watts, Radulphus de Glanvilla, & Robertus Picknot, for the counties of York, Richmond, Lancaster, Copland (*d*), Westmoreland, Northumberland, and Cumberland.

(*a*) A. D. 1176. Madox traces it several years higher. Hist. of Ex. c. iii. Louis le Gros introduced a similar institution, half a century before, in his dominions. Lyt. Hist. Hen. II. vol. v. sect. 271. 273.

(*b*) In the Black Book in the exchequer, cap. 8, they are called “justiciarii deambulantes” and “perlustrantes.”

(*c*) Blac. Com. 4 v. 422. Speed, 467. Janus Anglorum 108. Pryn. on 4 Inst. 150. cap. 33. Spelm. Gloss. verb. Iter.

(*d*) Copeland or Coupland, the southern part of Cumberland; so called from its rich veins of copper; or rather from Kopa, which in British means a head.

“ Hi, (consilio archiepiscoporum, episcoporum, comitum & baronum regni, &c. apud Nottingham existentium) missi sunt per singulos Angliæ comitatus & juraverunt quod cuilibet jus suum conservarent illæ sum.” Hoveden, fo. 313, & Mat. Paris, *in anno* 1176. And that these men were well known in the law, appears by their companion, Radulphus de Glanvilla; who seems to have been the author of the treatise *De Legibus Angliæ*, and was afterwards made *justitiarius Angliæ*.

To those justices was afterwards committed the conuzance of all civil and criminal pleas, happening within their divisions; and likewise pleas of the crown, pleas touching liberties, and the king's rights. And, the better to acquaint them with their business, there were certain assizes, which were first enacted at Clarendon, and afterwards confirmed at Northampton; they were not much unlike the *capitula itineris* mentioned in our old *Magna Charta*, but are not so perfect, and are set down by Hoveden *ubi supra*, and are too long to be here inserted. I shall only take notice of this one, viz. establishing descents, because I shall hereafter have occasion to use it:—“ Si quis obierit francus tenens hæredes ipsius remaneant in talem seisinam qualem pater suus, &c.”

But besides those courts in eyre, there were two great standing courts, viz. the exchequer and the court of king's bench, *vel curiam coram ipso rege, vel ejus justiciario*. And it was provided by the above mentioned assise—“ quod justiciæ faciant omnes justicios et rectitudines spectantes ad dominium regis, & ad coronam suam per breve domini regis vel illorum qui in ejus loco erunt de feodo dimidii militis & infra, nisi tam grandis sit quærela quod non possit deduci sine domino rege vel talis quam justiciæ ei reponunt pro dubitatione suâ, vel ad illos qui in loco ejus erunt, &c.”

Neither do I find any distinct mention of the court of common bench, in the time of this king; though in the time of king John, there is often mention made thereof; and the rolls of that court, of king John's time, are yet extant upon record. *Vide post. sub Richardi primi (C)*.

(C) The editor of the third edition of this History subjoined the following note, on the sentence to which the present note refers.—“ Notwithstanding what our author here writes, it appears by Glanville and others, that the common pleas was then also in being, and *Magna Charta* has only fixed that court to a certain place, which before was moveable and uncertain.”

The limitation of the assise of Novel Disceisin, is by those assizes appointed to be, “à tempore quo dominus rex venit in

Sir Edward Coke, it is true, strongly contends for the same position.—“For the antiquity of the court of common pleas, they err” (says Sir Edward) “that hold that before the statute of *Magna Charta* there was no court of common pleas, but had his creation by or after that charter; for the learned know, that in the six-and-twentieth year of Edward the third, the abbot of B. in a writ of assize brought before the justices in eire, claimed consuance and to have writs of assize, and other original writs out of the king’s court by prescription, time out of mind of man, in the reigns of Saint Edmond, and Saint Edward the Confessor, before the conquest. And on the behalf of the abbot were shewed divers allowances thereof in former times, in the king’s courts, and that king Henry the First confirmed their usage, and that they should have consuance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of *Magna Charta* erecteth no court, but giveth direction for the proper justification thereof in these words: *Communia placita non sequantur, curiam nostram, sed lenocantur in aliquo certo loco*. And properly the statute saith, *non sequantur*, for that the king’s-bench did in those days follow the king *ubicunque fuerit in Angliâ*, and therefore enacteth that common pleas should be holden in a court resident in a certain place. In the next chapter of *Magna Charta*, (made at one and the same time) it is provided, *et ea, quæ per eosdem (s. justiciarios et itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostros de banco, et ibi terminentur*. And in the next to that, *assise de ultimâ præsentatione semper capiantur coram justiciariis de banco, et ibi terminentur*. Therefore it manifestly appeareth, that at the making of the statute of *Magna Charta* there were *justiciarii de banco*, which all men confess to be the court of common pleas. And therefore that court was not erected by or after that statute.*” From the whole of Coke’s observations here and in the preface to his Eighth Report, it seems to have been his opinion, that the court of common pleas was not only a distinct court, at the time of making the *Magna Charta* of the 9th of Henry III. but also existed as such before the conquest. But according to Mr. Maddox, whose inquiries into the subject were certainly more minute, the origin of the court of common pleas is of a much later date. He so far agrees with Coke, as to admit, that the *Magna Charta* of Henry the Third rather confirmed, than erected, the bank or common pleas; and that such a court was in being several years before the *Magna Charta* of the 17th of king John, though it was then first made stationary. But in other respects sir Edward Coke and Mr. Maddox differ widely; for the latter thinks, that for some time after the conquest there was one great and supreme judicature called *curia regis*, which he supposes to have been of Norman and not of Anglo-Saxon original, and to have exercised jurisdiction over the common as well as other pleas; that the common pleas and exchequer were gradually separated from the *curia regis*, and became jurisdictions wholly distinct from it; and that the separation of the common pleas began in the reign of the first Richard, or early in the reign of John, and

* Co. Lit. 71. b. but see 2 Inst. 21. b. qn.

"Angliam proximam post pacis factam inter ipsum, & regem
"filium suum."

The same king afterwards, in the twenty-fifth year of his reign, divided the limits of his itinerant justices into four circuits or divisions; and to each circuit assigned a greater number of justices; viz.—five at least, which are thus set down in *Hoveden*, folio 337, viz. (a).

"Anno 1179. 25 H. 2. Magno concilio celebrato apud Win-
"deshores, communi concilio archiepiscoporum comitum & ba-
"ronum & coram rege filio suo, rex divisit Angliam in quatuor
"partes, & unicuique partium præfecit viros sapientes ad facien-
"dum justitiam in terra sua in hunc modum.

"1. Ricardus episcopus Winton, Ricardus thesaurarius regis,
"Nicholaus filius Turoldi, Thomas Basset & Robertus de White-
"field, for the counties of Southampton, Wilts, Gloucester,
"Somerset, Devon, Cornwall, Berks, and Oxon.

"2. Galfridus Eliensis episcopus, Nicholaus capellanus regis,
"Gilbertus Pipard, Reginald de Wisebeck capellanus regis, &
"Galfridus Hosce, for the counties of Cambridge, Huntingdon,
"Northampton, Leicester, Warwick, Winchester, Hereford,
"Stafford, and Salop.

"3. Johannes episcopus Norwicensis, Hugo Murdac clericus
"regis, Michael Bellet, Ricardus de le Pec, & Radulphus Brito,
"for Norfolk, Suffolk, Essex, Hartford, Middlesex, Kent, Surrey,
"Sussex, Bucks, and Bedford.

was completed by Henry the Third. See *Mad. Hist. Excheq.* fol. ed. 63. and the chapter on the division of the king's courts 529. See farther, 3 *Blackst. Comment.* 5th ed. 37. 2 *Inst.* 21. b. 4 *Inst.* 99. *Lamb. Archeion.* ed. 1635, p. 24 to 34. and the books cited in *Pryn* on 4 *Inst.* 52. *Harg.* note 2 on *Co. Lit.* 71. b. and see *Sullivan Lect.* xxxii. and *Barring.* on *Stat.* 10. Lord Bacon supposes that the court of common pleas was erected in the reign of Henry the Third*.

* Vol. ii. 378.

(a) This important ordinance of Henry had a direct tendency to restrain the oppressions of the barons, and to protect the inferior gentry and common people in their property. *Hoveden* 590. These justices were either prelates or considerable nobility; and besides carrying the authority of the king's commission, were

able, by the dignity of their own characters, to give weight and credit to the laws. The honour of bringing this wise institution to a settled state, is due to Henry II. Yet there is sufficient evidence, that courts were held, occasionally at least, by itinerant judges in more ancient times. *Madox Excheq.* 86. seq.

"4. Galfridus de Luci, Johannes Comyn, Hugo de Gaerst, Radulphus de Glanvilla, W. de Bendings, Alanis de Furnellis, for the counties of Nottingham, Derby, York, Northumberland, Westmoreland, Cumberland, and Lancaster.

"Isti sunt justiciæ in curia regis constituti ad audiendum clamos mores pupuli."

This prince did these three notable things, viz.

First, by this means he improved and perfected the laws of England, and doubtless transferred over many of the English laws into Normandy; which, as before is observed, caused that great suitableness between their laws and ours, So that the similitude did arise, much more by a CONFORMATION of their laws to those of England, than by any conformation of the English laws to theirs; especially in the reigns of king Henry II. and his two sons, king Richard, and king John, both of whom were also dukes of Normandy.

Secondly, he checked the pride and insolence of the pope and the clergy, by those constitutions made in a parliament at Clarendon, whereby he restrained the exorbitant power of the ecclesiastics, and the exemption they claimed from secular jurisdiction. And,

Thirdly, he subdued and conquered Ireland, and added it to the crown of England; which conquest was begun by Richard earl of Stigule, or Strongbow, 14 H. 2. but was perfected by the king himself, in the seventeenth year of his reign; and, for the greater solemnity of the business, was ratified by the FEALTIES of the bishops and nobles of Ireland, and by a bull of confirmation from pope Alexander; who was willing to interest himself in that business, to ingratiate himself with the king, and to gain a pretence for that ARROGANT USURPATION, of disposing of temporal dominions. *Vide* Hoveden, anno 14 H. 2. and the Ninth Chapter of this History (a).

(a) To the "three notable things" which sir Matthew Hale has thought proper to notice, Henry introduced and established the grand assize, or trial by a special kind of jury, in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. Blac. Com. 4. v. 422. All advances towards reason and good sense are slow and gradual.—Henry, though sensible of the great absurdity attend-

ing the trial by duel or battle, did not venture to abolish it: he only admitted either of the parties to challenge a trial by an assize or a jury of twelve freeholders. Glanv. lib. 2. cap. 7.—This latter method of trial seems to have been very ancient in England, and most probably was fixed by the laws of Alfred: but the barbarous and violent genius of the age had of late given more credit to the trial by battle, which had become the general

Richard I. eldest son of king Henry II. succeeded his father. I have seen little of record, touching the juridical proceedings, either of him or his said father, other than what occurs in the PIPE-ROLLS in the exchequer; which both in the time of Henry II. Richard I. and king John, and all the succeeding kings, are fairly preserved. And the best remembrances that we have of this king's reign in relation to the law, are what Roger Hoveden's Annals have delivered down to us, viz.

First, he instituted a body of naval laws in his return from the Holy Land, in the island of Oleron, which are yet extant, with some additions. *De quibus vide* Mr. Selden's *Mare Clausum*, lib. 2. cap. 24. I suppose they are the same which are attributed to him by Matt. Paris, anno 1196. And he constituted justices to put them in execution (D).

method of deciding all important controversies. There is an instance of it so late as the reign of Elizabeth. Vide Dyer's Rep. fo. 301. pl. 40. and the recent case of Ashford v. Thornton, 1 Barn. and Ald. 405. and Kendal's Argum. pub. 1818. The institution revived by this king, being found more reasonable and more suitable to a civilized people, gradually prevailed over it. It has since been abolished

—ante 145. and see 59 Geo. 3. c. 46. To the reign of Henry II. must also be referred the introduction of es- cuage, or pecuniary commutation for personal military service, which in process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land tax of later times. Blac. Com. 4 v. 423. See Madox, 435, 436, 437, 438. Tyrrel, vol. ii. 466. from the records.

(D) The laws of Oleron concerning naval affairs, are the only specimen of the legislative capacity of this brave and magnanimous prince. They are said to have been made at the isle of Oleron, off the coast of France, where his fleet rendezvoused in their passage to the Holy Land. These laws were designed for the keeping of order, and for the determination of controversies abroad; and they were framed with such wisdom, that they have been adopted by other nations as well as England. "I think," says Dr. Sullivan, "to this time we may, with probability enough, refer the origin of the admiralty jurisdiction." Sulliv. Lect. 331. Blac. Com. 4 v. 423. But see Dr. Henry's Hist. 3 v. 533.—These laws (forty-seven in number) are evidently very ancient, and no less prudent, humane and just. Many of them, from a change of manners and circumstances, have been long obsolete. Some doubt however, may be entertained whether or not Rich. I. was the author of the institution. Mr. Hallam, in his View of the Middle Ages, c. 9.—speaking of the maritime law—says, "the usual risks of navigation, and those incident to commercial adventure, produce a variety of questions in every system of jurisprudence, which though always to be determined, so far as possible, by the principles of natural justice, must in many cases depend upon established customs. These customs of maritime law, were anciently reduced into a code by the Rhodians, and the Roman emperors preserved or reformed the constitutions

Secondly, he observed the same method of distributing justice as his father had begun, by justices itinerant *per singulos Anglia*

of that republic. It would be hard to say, how far the tradition of this early jurisprudence, survived the decline of commerce in the darker ages; but after it began to recover itself, necessity suggested, or recollection prompted, a scheme of regulations, resembling in some degree, but much more enlarged, those of antiquity. This was formed into a written code, *Il Consolato del Mare*, not much earlier, probably, than the middle of the thirteenth century; and its promulgation seems rather to have proceeded from the citizens of Barcelona, than from those of Pisa or Venice, who have also claimed to be the first legislators of the sea*. Besides regulations simply mercantile, this system has defined the mutual rights of neutral and belligerent vessels, and thus laid the basis of the positive law of nations in its most important and disputed cases. The king of France and count of Provence, solemnly acceded to this maritime code, which thus acquired a binding force within the Mediterranean sea; and in most respects the law merchant of Europe, is at present conformable to its provisions. A set of regulations, chiefly borrowed from the *Consolato*, was compiled in France under the reign of Louis the 9th, and prevailed in our own country. These have been denominated the laws of Oleron, from an idle story, that they were enacted by Richard the 1st, while his expedition to the Holy Land, lay at anchor in that island†. Nor was the north without its peculiar code of maritime jurisprudence; namely, the ordinances of Wisbuy, a town in the isle of Gothland, principally compiled from those of Oleron, before the year 1400, by which the Baltic traders were governed‡. There was abundant reason for establishing among maritime nations, some theory of mutual rights, and for securing the redress of injuries as far as possible, by means of acknowledged tribunals. In that state of barbarous anarchy, which so long resisted the coercive authority of civil magistrates, the sea held out, even more temptation and more impunity, than the land; and when the laws had regained their sovereignty, and neither robbery nor private warfare

* Boucher supposes it to have been compiled at Barcelona about 900, but his reasonings are inconclusive, t. 1. p. 72. and indeed Barcelona at that time was little, if at all, better than a fishing town. Some argument might be drawn in favour of Pisa, from the expressions of Henry 4th's charter granted to that city, in 1081. *Consuetudines, quas habent de mari, sic iis observabimus sicut illorum est consuetudo*. Muratori, Dissert. 45. Gianone seems to think the collection was compiled about the reign of Louis IX. l. xi. c. 6. Capmany, the last Spanish editor, whose authority ought perhaps to outweigh every other, asserts, and seems to prove them to have been enacted by the mercantile magistrates of Barcelona, under the reign of James the Conqueror, which is much the same period. (*Código de las Costumbres marítimas de Barcelona*, Madrid 1791.) But, by whatever nation they were reduced into their

present form, these laws were certainly the ancient and established usages of the Mediterranean states; and Pisa may very probably have taken a great share in first practising, what a century or two afterwards was rendered more precise at Barcelona.

† Macpherson, p. 338. Boucher supposes them to be registers of actual decisions.

‡ Mr. Hallam says he has only the authority of Boucher for referring the ordinances of Wisbuy, to the year 1400. Beckman imagines them to be older than those of Oleron. But Wisbuy was not enclosed by a wall till 1288; a proof that it could not have been previously a town of much importance. It flourished chiefly in the first part of the fourteenth century, and was at that time an independent republic; but fell under the yoke of Denmark before the end of the same age.

comitatus; to whom he delivered two kinds of extracts or articles of inquiry, viz. *capitula corona*, much reformed and augmented

was any longer tolerated, there remained that great common of mankind, unclaimed by any king; and the liberty of the sea was another name for the security of plunderers. A pirate, in a well-armed quick-sailing vessel, must feel the enjoyments, of his exemption from controul, more exquisitely than any other freebooter; and, darting along the bosom of the ocean, under the impartial radiance of the heavens, may deride the dark concealments and hurried flights of the forest-robber. His occupation is indeed extinguished by the civilization of later ages, or confined to distant climates. But in the thirteenth and fourteenth centuries, a rich vessel was never secure from attack; and neither restitution, nor punishment of the criminals, was to be obtained from governments who sometimes feared the plunderer, and sometimes connived at the offence*. Mere piracy was not however the only danger. The maritime towns of Flanders, France, and England, like the free republics of Italy, prosecuted their own quarrels by arms, without asking leave of their respective sovereigns. This practice, exactly analogous to that of private war in the feudal system, more than once involved the kings of France and England in hostility†. But where the quarrel did not proceed to such length as absolutely to engage two opposite towns, a modification of this ancient right of revenge, formed part of the regular law of nations, under the name of reprisal. Whoever was plundered or injured by the inhabitant of another town, obtained authority from his own magistrates, to seize the property of any other person belonging to it, until his loss should be compensated. This law of reprisal was not confined to maritime places, it prevailed in Lombardy, and probably in the German cities. Thus, if a citizen of Modena, was robbed by a Bolognese, he complained to the magistrates of the former city, who represented the case to those of Bologna, demanding redress. If this were not immediately granted, letters of reprisal were issued, to plunder the territory of Bologna, till the injured party should be reimbursed by sale of the spoil‡. In the laws of Marseilles it is declared 'If a foreigner take any thing from a citizen of Marseilles, and he who has jurisdiction over the said debtor, or unjust taker, does not cause right to be done in the same, the rector or consuls, at the petition of the said citizen, shall grant him reprisals upon all the goods of the said debtor or unjust taker, and also upon the goods of others, who are under the jurisdiction of him who ought to do justice and would not to the said citizen of Marseilles§.' Edward the 3d remonstrates, in an instrument published by Rymer, against letters of marque granted by the king of Arragon to one Berrenger de la Tone, who had been robbed

* Hugh Despencer seized a Genoese vessel valued at 14,300 marks, for which no restitution was ever made. Rym. 4. p. 701. Macpherson, A. D. 1336.

† The cinque ports and other trading towns of England were in a constant state of hostility with their opposite neighbours during the reigns of Edward I. and II. One might quote almost half the instruments in Rymer, in proof of these conflicts, and of

those with the mariners of Norway, and Denmark. Sometimes mutual envy produced frays between different English towns. Thus in 1254, the Winchelsea mariners attacked a Yarmouth galley, and killed some of her men. Matt. Paris, apud Macpherson.

‡ Muratori, Dissert. 53.

§ Du Cange, voc. Laudum.

from what they were before, and *capitula de Judæis* (a). The whole may be read in Hoveden, fo. 423. *sub anno* 5 R. 1. and by those articles it appears, that at that time there was a settled court for the common pleas, as well as for the king's bench. Though it seems that pleas of LAND were then INDIFFERENTLY held in either; as appears by the first and second articles thereof, where we have,—“*placita per breve domini regis, vel per breve capituli justiciæ, vel à capitali curiâ regis coram eis (justiciis) missa:*” the former whereof seems to be the common pleas,

by an English pirate of 2,000*l.* alleging, that inasmuch as he had always been ready to give redress to the party, it seemed to his counsellors, that there was no just cause for reprisals, upon the king's or his subjects' property*. This passage is so far curious, as it asserts the existence of a customary law of nations, the knowledge of which was already a sort of learning. Sir E. Coke speaks of the right of private reprisals, as if it still existed, and it is certainly preserved in an unrepealed statute †.

“A practice founded on the same principles as reprisals, though rather less violent, was that of attaching the goods or persons of resident foreigners for the debts of their countrymen. This indeed in England was not confined to foreigners until the Statute of Westminster 1. c. 23. which enacts that ‘No stranger who is of this realm shall be distrained in any town or market for a debt wherein he is neither principal nor surety.’ Henry 3d had previously granted a charter to the burgesses of Lubec, that they should not be arrested for the debt of any of their countrymen, unless the magistrates of Lubec neglected to compel payment ‡. But by a variety of grants from Edward the third, the privileges of English subjects under the statute of Westminster were extended to most foreign nations §. This unjust responsibility had not been confined to civil cases. One of a company of Italian merchants, the Spini having killed a man, the officers of justice seized the bodies and effects of all the rest ¶.” Hallam's View, c. 9. 2 v. 481.

* Rym. t. 4. p. 577. Videtur sapientibus et peritis, quod causa, de jure, non subfuit marcham seu reprisalam in nostris, seu subditorum nostrorum, bonis concedendi. See too a case of neutral goods on board an enemy's vessel claimed by the owners, and a legal distinction taken in favour of the captors, t. 6. p. 14.

† 27 E. III. stat. 2. c. 17. 2 Inst. p. 205. See instances of letters of private reprisal

granted by Henry IV. Rym. t. 8. p. 96. 717. 773.

‡ Rymer, t. i. p. 839.

§ Idem. t. iii. p. 548. 647. 678. et infra. See too the Ordinances of the Staple in 27 Edw. III. which confirm this among other privileges, and contain manifold evidence of the regard paid to commerce in that reign.

¶ Rymer, t. ii. p. 891. Madox Hist. Exchequer. c. 22. s. 7.

(a) The justices of the Jews, before that time, used to be Jews and Christians; thenceforward only Christians. They were to adjudge what revenue should be paid by the Jews to the

king for protection;—license to trade, &c. and for judgments where Jews were parties, &c. Mad. c. 7. 2 Inst. 506. 4. Inst. 254.

which held pleas by original writ, which writ was under the king's *este*, when he was in England. But when he was beyond the seas, it was under the *teste* of the *justiciarius Angliæ*, as the *custos regni* in the king's absence (a).

The power which the justices itinerant had to hold pleas in writs of right, or the grand assize, was sometimes limited—as here by the *articuli coronæ* under Henry II.—to half a knight's fee, or under. For here, in these articles it is, “*de magnis assisis quæ sunt de centum solidis & infra.*” But in the next commissions, instructions, or *capitula coronæ*, it is, “*de magnis assisis usque ad decem libratas terræ & infra.*”

In his eighth year, he established a common rule for weights and measures throughout England, called *assisa de mensuris*; wherein we find, the measure of woollen cloths, was then the same with that of *Magna Charta*, 9 H. 3. viz. “*de duobus ulnis infra bisuras* (b).”

In the year before his death, the like justices errant, went through many counties of England, to whom articles, or *capitula iudiciorum coronæ*, not much unlike the former, were delivered. Vide Hoveden, *sub anno* 1198, fo. 445.

And in the same year, he issued commissions in the Trent, Hugh de Neville being chief justice; and to those were also delivered articles of inquiry, commonly called *assisa de forestâ*, which may be read at large in Hoveden, *sub eodem anno*. These gave great discontent to the kingdom, for both the laws of the forest and their execution were rigorous and grievous (c).

King John succeeded his said brother, both in the kingdom of England, and duchy of Normandy. The evidence that we have, touching the progress of the laws of his time, are princi-

(a) Vide note (C) on this chapter, and Fleta, l. 2. c. 24.

(b) He established by law one weight and measure throughout his kingdom. *fat. Paris*, 109. 134. *Trivet*, 127. *Ann. Waverl.* 165. *Hoved.* 774. An useful institution, which the mercenary disposition and necessities of his successor engaged him to dispense with for money.

(c) Mr. Justice Blackstone, speaking of Richard I. says he was “a sportsman as well as a soldier, and therefore enforced the forest laws with some rigour, which occasioned

“many discontents among his people; though (according to Matthew Paris) he REPEALED the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions.”—*Blac. Com.* 4 v. 423.—Mr. Hume says, that Richard RENEWED the severe laws against transgressors in his forests, whom he punished by castration, and putting out their eyes, as in the reign of his great grandfather. *Hist. Eng.* 2 v. oct. 38.

pally three, viz. first, his charters of liberties. Secondly, the records of pleadings and proceedings in his courts. Thirdly, the course he took for settling the English laws in Ireland.

1. Touching the first of these, his charters of the liberties of England, and of the forest, were hardly and with difficulty gained by his baronage, at Stanes, *anno Dom.* 1215. The collection of the former was, as Matt. Paris tells us, upon the view of the charter or law of king Henry I. which he says, contained “*quasdam libertates & leges à rege Edvardo Sancto, ecclesiæ & magnatibus concessas, exceptis quibusdam libertatibus quas idem rex de suo adjecit;*” and that thereupon the baronage fell into a resolution to have those laws granted by king John. But as it is certain, that the laws added by king Henry I. to those of the Confessor, were many more, and much differing from his; so the laws contained in the Great Charter of king John, differed much from those of king Henry I. Neither are we to think, that the charter of king John, contained ALL the laws of England; but only, or principally, such as were of A MORE COMPREHENSIVE NATURE, and concerned the common rights and liberties of the church, baronage, and commonalty; which were of the greatest moment, and had been most invaded by king John’s father and brother (E).

(E) In the time of John, the rigours of the feudal system and the forest laws were so warmly maintained, that they occasioned many insurrections. At length, however, the confederated barons and the king agreed on a conference, which was appointed to be held at Runnemede, between Windsor and Staines; a place which has ever since been extremely celebrated on account of this great event. The two parties encamped apart, like open enemies; and after a debate of a few days, the king, with a facility which was somewhat suspicious, signed and sealed the charter which was required of him. The vices, the follies, and the losses of John, not only constrained and encouraged his subjects to demand, but enabled them to obtain, this great palladium of English liberty. This famous *capitularium*, commonly called the Great Charter, either granted or secured, very important liberties and privileges, to every order of men in the kingdom.

It confirmed many liberties of the Church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distress or other process, for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony, in the same manner as it

The lesser Charter, or *de Forestâ*, was to reform the exoesses and encroachments which had been made, especially in the time

still remains ; prohibited for the future the grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights ; it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children ; it laid down the law of dower, as it hath continued ever since ; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern ; it enjoined an uniformity of weights and measures ; gave new encouragements to commerce, by the protection of merchant strangers ; and forbade the alienation of lands in mortmain. With regard to the administration of justice ; besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses ; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits : it also corrected some abuses then incident to the trials by wager of law and of battle ; directed the regular awarding of inquests for life or member ; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer ; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And lastly, (which alone would have merited the title that it bears, of the Great Charter) it protected every individual of the nation, in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land*. See Blackstone's tract, which is an excellent edition of the Great Charter, with an introductory historical discourse. To insure the observance of the Great Charter, John allowed the barons to choose five-and-twenty members from their own body, as conservators of the public liberties. If any complaint was made of a violation of the charter, any four of these barons might admonish the king to redress the grievance ; and if satisfaction was not obtained, they could assemble the whole council of twenty-five ; who, in conjunction with the great council, were empowered to compel him. All men throughout the kingdom were bound to swear obedience to the five-and-twenty barons ; and the freeholders of each county were to choose twelve knights, who were to make report of such evil customs as required redress, conformable to the tenour of the Great Charter†.

Those men were, by this convention, really invested with the sovereignty of the kingdom ; were rendered co-ordinate with the king, or rather superior to him, in the exercise of the executive power ; and as there was no circumstance

* Blac. Com. 4 v. 425.

† Mat. Paris, 181. This seems a certain proof that the house of commons was not then in being ; otherwise the knights and

burgesses from the several counties could have given in to the lords a list of the grievances, without any new election.

of Richard I. and Henry II. who had made new afforestations, and much extended the rigor of the forest laws. And both these charters do, in substance, agree with that *Magna Charta, et de Forestâ*, granted and confirmed 9 Hen. 3.—I shall not need to recite them, or to make any collections or inferences from them. They are both extant in the Red Book of the exchequer, and in Matt. Paris, *sub anno* 1215. The record and the historian do *verbatim* agree.

As to the second evidence we have, of the progress of the laws in king John's time; they are the records of pleadings and proceedings which are still extant. But although this king endeavoured to bring the law, and the pleadings and proceedings thereof, to some better order than he found it, yet for saving his profits thereof, he was very studious; and for the better reduction of it into order and method, we find frequently in the records of his time, fines imposed *pro stultiloquio*; which were no other than mulots, imposed by the court for barbarous and disorderly pleading: from whence afterwards, that common fine arose *pro pulchrè placitando*, which was indeed no other than a fine for want of it. And yet, for all this, the proceedings in his courts were rude, imperfect, and defective, to what they were in the ensuing times of Edward I. &c. But some few observables I shall take notice of, upon the perusal of the judicial records of the time of king John, viz.

First, that the courts of king's bench and common pleas were THEN DISTINCT COURTS, and distinctly held from the beginning to the end of king John's reign (a).

Secondly, that as yet, neither one, nor both, of those courts dispatched the business of the kingdom: but a great part thereof was dispatched by the justices itinerant, which were sometimes in use, but not without their intermissions. And much of the publick business was dispatched in the county courts, and in other inferiour courts. And so it continued, though with a gradual decrease till the end of king Edward I. and for some time after. Hence it was, that in those elder times, the profits of those county

of government, which, either directly or indirectly, might not bear a relation to the security or observance of the Great Charter, there could scarce occur any incident in which they might not lawfully interpose their authority.*
HUME.

* Dr. Hen.'s Hist. 3 v. 182, 369 to 385.

(a) Vide note (C) on this chapter.

courts arose, for which the sheriff answered in his farm, *de profit-cuis comitatús*. Also fines were levied there, and post fines, and fines *pro licentiâ concordandi*, and great fines there answered. Fines *pro inquisitionibus habendi*, fines for misdemeanours, though called amerciaments, arose to great sums, as will appear to any who shall peruse the ancient viscontiels.

But, as I said before, the business of inferior courts, grew gradually less and less; consequently their profits and business of any moment, came to the great courts where they were dispatched with greater justice and equality. Besides, the greater courts, observing what partiality and brocage was used in the inferior courts, gave a pretty quick ear to writs of false judgment; which was the appeal the law allowed, from erroneous judgments in the county courts (a). And this, by degrees, wasted the credit and business of those inferior courts.

Thirdly, that the distinction between the king's bench and common bench, as to the point of *communia placita*, was not YET, nor for some time after, settled. Hence it is, that frequently in the time of king John, we shall find that common pleas were held in *B. R.*—Yea, in Mich. & Hil. 13 *Johannis*, a fine was levied *coram ipso rege*, between Gilbert Fitz Roger and Helwise his wife, plaintiffs, and Robert Barpyard, tenant of certain lands in Kirby, &c. (b).

And again; whereas there was frequently a liberty granted anciently by the kings of England, and allowed, "*quod non implacitetur nisi coram rege*," I find *inter placita de diversis Terminis secundo Johannis*, that upon a suit between Henry de Rochala and the abbot of Leicester, before the justices *de banco*, the abbot pleaded the charter of king Richard I. "*quod idem abbas pro nullo respondeat nisi coram ipso rege vel capitali justitiario suo*." And it is ruled against the abbot, "*quia omnia placita quæ coram justic. de banco tenentur, coram domino regi vel ejus capitali justitiario teneri intelliguntur*." But this point was afterwards settled by the statute of *Magna Charta* (c), "*quod communia placita non sequantur curiam nos-*"
"tram."

Fourthly, that the four terms, were then held according as

(a) A writ of false judgment lies whenever a false judgment is given in an inferior court not of record. F. N. B. 17. Moor 73. (b) See note (C) on this chapter. Barr. Obs. on Stat. 10, 11, and Sulliv. Lect. 312. seq. (c) Cap. 11.

was used in after-times, with little variance, and had the same denominations they still retain.

Fifthly, that there were oftentimes considerable sums of money, or horses, or other things, given to obtain justice. Sometimes it is said to be *pro habendâ inquisitione, ut supra*. And *inter placita incerti temporis regis Johannis*, the men of Yarmouth against the men of Hastings and Winchelsea, “afferunt domino regi tres “palfridos & sex asturias narenses ad inquisitionem habendam “per legales, &c.” And frequently the same was done, and often accounted for in the PIPE-ROLLS, under the name of OBLATA. To remedy this abuse, was the provision made in king John’s and king Henry the Third’s charters, “NULLI VENDEMUS JUSTITIAM VEL RECTUM (a).” But yet fines upon originals, being certain, have continued to this day, notwithstanding that provision; but those enormous *oblata* before mentioned, are thereby remedied and taken away (F).

(a) Barring. on Stat. 22. Mag. Car. cap. 29.

(F) Fines, amerciaments, and OBLATAS, as they were called, were a considerable branch of the royal power and revenue. The ancient records of the exchequer, which are still preserved, give surprising accounts of the numerous fines and amerciaments levied in those days*, and of the strange inventions fallen upon to exact money from the subject. It appears that the old kings of England put themselves entirely on the footing of the barbarous eastern princes, whom no man must approach without a present, who sell all their good offices, and intrude themselves into every business, that they may have a pretence of extorting money. Even justice was avowedly bought and sold; the king’s court itself, though the supreme judicature of the kingdom, was open to none that brought not large presents to the king; the bribes given for the expedition, delay†, suspension, and, doubtless, for the perversion of justice, were entered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times. The barons of the exchequer, for instance, the first nobility of the kingdom, were not ashamed to insert, as an article in their records, that the county of Norfolk paid a sum that they might be fairly dealt with‡; the borough of Yarmouth, that the king’s charters, which they have for their liberties, might not be violated§; Richard, son of Gilbert, for the king’s helping him to recover his debt from the Jews||; Serlo, son of Terlavaston, that he might be permitted to make his defence, in case he was accused of a certain homicide¶; Walter de Burton for free law, if accused of wounding another**;

* Madox’s Hist. Exch. 272.

† Id. 274, 309.

‡ Id. 295.

§ Id. *ibid.*

|| Madox’s Hist. Excheq. 296. He paid two hundred marks, a great sum in those days.

¶ Id. 296.

** Id. *ibid.*

Sixthly, that in all the time of king John, the purgation *per ignem & aquam*, or the trial by ORDEAL, continued : as appears by frequent entries upon the rolls (a). But it seems to have ended with this king, for I do not find it in use in any time after. Perchance the barbarousness of the trial, and persuasions of the clergy, prevailed at length to antiquate it, for many canons had been made against it(G).

Robert de Essart, for having an inquest to find whether Roger the butcher, and Wace and Humphrey, accused him of robbery and theft out of envy and ill-will or not * ; William Buhust, for having an inquest to find whether he was accused of the death of one Godwin, out of ill-will or for just cause †. These few instances are selected from a great number of the like kind, which Madox selected from a still greater number, preserved in the ancient rolls of the exchequer ‡.

Sometimes the party litigant proffered the king a certain portion, a half, a third, a fourth ; payable out of the debts, which he, as the executor of justice, should assist him in recovering §. Theophania de Westland agreed to pay the half of 212 marks, that she might recover that sum against James de Fugleston ¶ ; Solomon the Jew, engaged to pay one mark out of every seven that he should recover against Hugh de la Hosc ¶ ; Nicholas Morrel promised to pay sixty pound, that the earl of Flanders might be distrained to pay him three hundred and forty-three pound, which the earl had taken from him ; and this was to be paid out of the first money that Nicholas should recover of the earl **. There were no profits so small as to be below the king's attention—his protection and good offices, of every kind, were bought and sold.

* Id. 298.

† Id. 302.

‡ Chap. 12.

§ Id. 311.

¶ Id. ibid.

¶ Id. 79, 312.

** Id. 312.

(a) Barring. on Stat. 296. Blac. Com. 4 v. 425.

(G) Our ancestors, as an infallible method of discovering truth, and of guarding against deception, appealed to heaven, and referred every point in dispute, to be determined, as they imagined, by the decisions of unerring wisdom and impartial justice. The person accused, in order to prove his innocence, submitted, in some cases, to trial, by plunging his arm in boiling water ; by lifting a red-hot iron with his naked hand ; by walking barefoot over burning ploughshares ; or by other experiments equally perilous and formidable. On other occasions, he challenged his accuser to fight him in single combat. All these various forms of trial, were conducted with many devout ceremonies ; the ministers of religion were employed, the Almighty was called upon to interpose, for the manifestation of guilt, and for

Seventhly, in this king's time, the descent of socage, as well as knight's service lands, to the ELDEST son, prevailed in all

the protection of innocence ; and whoever escaped unhurt, or came off victorious, was pronounced to be acquitted by the judgment of God *.

Among all the whimsical and absurd institutions which owe their existence to the weakness of human reason, this, which submitted questions that affected the property, the reputation, and the lives of men, to the determination of chance, or of bodily strength and address, appears to be the most extravagant and preposterous. There were circumstances, however, which led the nations of Europe, to consider this equivocal mode of deciding any point in contest, as a direct appeal to heaven, and a certain method of discovering its will. As men are unable to comprehend the manner in which the Almighty carries on the government of the universe, by equal, fixed, and general laws, they are apt to imagine, that in every case which their passions or interests render important in their own eyes, the supreme Ruler of all, ought visibly to display his power, in vindicating innocence and punishing vice. It requires no inconsiderable degree of science and philosophy, to correct this popular error. But the sentiment prevalent in Europe during the dark ages, instead of correcting, strengthened it. Religion, for several centuries, consisted chiefly in believing the legendary history of those saints, whose names crowd and disgrace the Romish Calendar. The fabulous tales concerning their miracles, had been declared authentic by the bulls of popes, and the decrees of councils ; they made the great subject of the instructions which the clergy offered to the people, and were received by them with implicit credulity and admiration.

By these, men were accustomed to believe that the established laws of nature might be violated, on the most frivolous occasions, and were taught to look rather for particular and extraordinary acts of power under the divine administration, than to contemplate the regular progress and execution of a general plan. One superstition prepared the way for another ; and whoever believed that the supreme Being had interposed miraculously on those trivial occasions mentioned in legends, could not but expect his intervention in matters of greater importance, when solemnly referred to his decision †. The cannon law very early declared against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "cum sit contra præceptum Domini, non tentabis Dominum Deum tuum." Decret. part 2. caus. 2. qu. 5. dist. 7. Decretal. lib. 3. tit. 50. c. 9. and Spelm. Gloss. 435. Upon this authority, though the canons themselves were of no validity in England, it was thought proper to abolish this mode of trial entirely in our courts of justice, by an act of parliament in 3 Hen. III. according to sir Edward Coke, 9 Rep. 32. or rather by an order of the king in council, 1 Rym. Feod. 228. Spelm. Gloss. 326. 2 Pryn. Rec. Append. 20. Seld. Eadm. fol. 48. A faint mark of improvement in the age.

The most common kinds of ordeal used in England, were—the judicial combat ; the ordeal of the cross ; the ordeal of the corned ; the ordeal of cold

* Murat. Dissertatio de judiciis Dei. Antiquit. Italic. vol. iii. p. 612.

† Roberts, Cha. V. 1 v. oct. 59. Bist. Com. L. 4. c. 27.

places (a); unless there was a special custom, that the lands were partible *inter masculos*. And therefore, Mich. *secundo Johannis*, in a *rationabili parte bonorum*, by Gilbert Beville against William Beville his elder brother, for lands in Gunthorpe, the defendant pleaded, “*quod nunquam partita vel partibilia fuere;*” and because the defendant could not prove it, judgment was given for the demandant. And by degrees it prevailed so, that whereas at this time the averment came on the part of the heir at law, that the land “*nunquam partita vel partibilis extetit;*” in a little time after the averment was turned on the other hand, viz. that though the land was socage, yet unless he did aver and prove that it was PARTITA ET PARTIBILIS he failed in his demand (b).

Thirdly, the third instance of the progress of king John's reign, in relation to the common law, was his settling the same in Ireland, which he made his more immediate and particular business. But hereof we shall add a particular chapter by itself (c), when we have shewn you what proceedings and progress was made therein in the time of Edward I. The many and great troubles that fell upon king John and the whole kingdom, especially towards the latter end of his reign, did much hinder the good effect of settling the laws of England, and consequently the peace thereof; which might have been bottomed, especially upon the Great Charter. But this unfortunate prince and the kingdom were so entangled with intestine wars, and with the invasion of the French, who assisted the English barons against their king, and by the advantages and usurpations that the pope and the clergy made by those distempers, that all ended in a confusion with the king's death (d).

water; the ordeal of hot water; the ordeal of hot iron. The modes in which these appeals to heaven were performed, are noticed by Dr. Henry in the second volume of his History of England *. If we suppose that few or none escaped conviction, who thus exposed themselves, we shall be very much mistaken. The whole was a gross imposition on the credulity of mankind. See Verstegan's Restitution of Decayed Intelligence, as to the Ordeal of the Saxons, small quarto, 1634.

* Page 303 to 308.

(a) Vide post. cap. 11. passim.

(b) Which seems more reasonable; otherwise the defendant was called upon to prove a negative.

(c) Cap. 9.

(d) It should not be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parlia-

ments, are found in the great charter of king John, though omitted in that of Henry III. John, in the ninth year of his reign, first gave by charter to the city of London, the right of electing annually a mayor, out of its own body, an office which, till then, had been held for life.

I come therefore to the long and troublesome reign of Henry III. who was about nine years old at his father's death; he being born *in festo sancti Remigii* 1207 (a), and king John died *in festo sancti Lucae* 1216. The young king was crowned the 28th of October (b), being then in the tenth year of his age, and was under the tutelage of William earl-marshal (c).

The nobility were quick and earnest, notwithstanding his minority, to have the liberties and laws of the kingdom confirmed. Preparatory thereto, in the year 1223, writs issued to the several counties to enquire, by twelve good and lawful knights, "*quæ fuerunt in libertates in Angliâ tempore regni Henrici avi sui*," returnable *quindena Paschæ*. What success those inquisitions had, or what returns were made thereof, appears not. But in the year following, the young king standing in need of a supply of money from the clergy and laity, none would be granted, unless the liberties of the kingdom were confirmed, as they were expressed and contained in the two charters of king John; which the king accordingly granted in his parliament at Westminster, and they were accordingly proclaimed, "*ita quod chartæ utro- rumque regum in nulla inveniatur dissimiles*." MAT. PARIS, anno 1224.

In the year 1227, the king holding his parliament at Oxford, and being now of full age, by ill advice, causes the two charters he had formerly granted to be cancelled; "*hanc occasionem prætendens, quod chartæ illæ concessæ fuerunt & libertates scriptæ & signatæ dum ipse erat sub custodiâ, nec sui corporis aut sigilli aliquam potestatem habuit, unde viribus carere debuit, &c.*" Which fact occasioned a great disturbance in the kingdom: This inconstancy in the king was in truth THE FOUNDATION OF ALL HIS FUTURE TROUBLES, and yet was ineffectual to his end and purpose; for those charters were NOT avoidable for the king's nonage; and if there could have been any such

(a) Henry III. was born on the first of October 1207.

(b) He was crowned on the 28th of October 1216. M. Paris, 200. Hist. Croyl. Cont. 474. W. Heming. 562. Trivet, 168.

(c) The earl of Pembroke;—who at the time of John's death was not earl mareschal, but marshal of the king's household. He was also custos

regis & regni, and chief justice. By office he was at the head of the armies, and consequently, during a state of civil wars and convulsions, at the head of the state. It happened fortunately for the young monarch, and for the nation, that the power could not have been intrusted into more able and more faithful hands.

pretence, that alone would NOT avoid them, for they were laws CONFIRMED IN PARLIAMENT.

But the Great Charter, and the Charter of the Forest, did not expire so; for, in 1253, they were again sealed and published. And because, after the battle of Evesham, the king had wholly subdued the barons, and thereby a jealousy might grow, that he again meant to infringe it, in the parliament of Marlbridge^(a) they were again confirmed. And thus we have the great settlement of the laws and liberties of the kingdom, established in this king's time. The charters themselves are not every word the same with those of king John, but they differ very little in substance.

This Great Charter, and *Charta de Forestâ*, was the great basis upon which this settlement of the English laws stood, in the time of this king and his son. There were also some additional laws of this king yet extant, which much polished the common law, viz. the statutes of Merton and Marlbridge, and some others.

We have likewise two other PRINCIPAL MONUMENTS of the great advance and perfection that the English laws, attained to under this king, viz. the tractate of Bracton, and those records of pleas, as well in both benches, as before the justiccs itinerant, the records whereof are still extant.

Touching the former, viz. Bracton's tractate, it yields us a great evidence of the growth of the laws, between the times of Henry II. and Henry III. If we do but compare Glanville's book, with that of Bracton, we shall see A VERY GREAT ADVANCE OF THE LAW, in the writings of the latter, over what they are in Glanville. It will be needless to instance particulars. Some of the writs and processes do indeed in substance agree, but the proceedings are much more regular and settled, as they are in Bracton, above what they are in Glanville. The book itself in the beginning, seems to borrow its method from the civil law. But the greatest part of the substance is, either of the course of proceedings in the law known to the author; or of resolutions and decisions in the courts of king's bench and common bench, and before justices itinerant; for now the inferior courts began to be of little use or esteem ^(b).

(a) Cap. v.

(b) It is worthy of remembrance, that towards the end of the reign of this monarch, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament.

As to the judicial records of the time of this king, they were grown to a much greater degree of perfection, and the pleadings more orderly; many of which are extant. But the great troubles, and the civil wars that happened in his time, gave a great interruption to the legal proceedings of courts. They had a particular commission and judicatory, for matters happening in time of war, stiled *placita de tempore turbationis*, wherein are many excellent things. They were made principally about the battle of Evesham, and after it. And for settling of the differences of this kingdom, was the *Dictum* or *Edictum de Kenelworth* (a) made, which is printed in the old *Magna Charta*.

We have little extant of resolutions in this king's time, but what are either remembered by Bracton, or some few broken and scattered Reports, collected by Fitzherbert, in his Abridgment. There are also some few sums, or constitutions, relative to the law; which though possibly NOT acts of parliament, yet have obtained in use, as such. As,—“*de districtione scaccarii, statutum panis & cerevisæ, dies communes in banco, statutum Hiberniæ, stat. de scaccario, judicium collistrigii,*” and others (b).

We come now to the time of Edward I. who is well stiled our ENGLISH JUSTINIAN; for in his time the law, *quasi per saltum*, obtained a very great perfection.

The pleadings are SHORT indeed, but excellently good and PERSPICUOUS. And although, for some time, some of those imperfections and ancient inconvenient rules obtained; as for instance, in point of descents; where the MIDDLE brother held of the eldest, and dying without issue, the lands descended to the YOUNGEST upon that old rule, in the time of Henry II. “*nemo potest esse dominus & hæres,*” mentioned in Glanville; at least if he had once received homage, 13 E. 1. Fitz. Avowry 235. Yet the laws did never, in any one age, receive so great and sudden an advancement. Nay, I think I may safely say, all the ages since his time have NOT done so much, in reference to the orderly settling and establishing of the distributive justice of this kingdom, as he did within a short compass of the thirty-five years of his reign; especially about the first thirteen years thereof (c).

Indeed, many penal statutes and provisions, in relation to the peace and good government of the kingdom, have been since

(a) Vide cap. 1.

(b) Barr. on Stat. 39, 46.

(c) Fleta lib. 6. c. 1. s. 15. Glanv. lib. 7. s. 1. Blac. Com. 4 v. oct. 425.

made. But, as touching the common administration of justice, between party and party, and accommodating of the rules, and of the methods and orders of proceeding, HE DID THE MOST, at least of any king since William I.—and left the same, as a fixed and stable rule and order of proceeding, very little differing from that which we now hold and practise; especially as to the substance and principal contexture thereof.

It would be the business of a volume, to set down all the particulars, and therefore I shall only give some short observations touching the same (a).

First, he perfectly settled the Great Charter and *Charta de Foresta*, not only by a practice consonant to them, in the distribution of law and right; but also by that solemn act passed 25 E. 1. and styled *confirmationes cartarum*.

Secondly, he established and distributed the several jurisdictions of courts, within their proper bounds. And because this head has several branches, I shall subdivide the same, viz.

1. He checked the incroachments and insolences of the pope and the clergy, by the statute of Carlisle.

2. He declared the limits and bounds of the ecclesiastical jurisdiction, by the statutes of *circumspecte agatis & articuli cleri*. For note, though this latter statute was not published till Edward II. yet it was COMPILED in the beginning of Edward I.

3. He established the limits of the court of common pleas; perfectly performing the direction of *Magna Charta*, "*quod communia placita NON SEQUANTUR curia nostra*," in relation to B. R.; and in express terms extending it to the court of exchequer, by the statute of *articuli super chartas*, cap. 4. It is true, upon my first reading of the *placita de banco* of Edward the First, I found very many appeals of death, of rape, and of robbery therein; and therefore I doubted whether the same were not held, at least by writ, in the common pleas court: but upon better enquiry, I found many of the records, before justices itinerant were entered, or filled up, among the records of the common pleas; which might occasion that mistake.

4. He established the extent of the jurisdiction of the steward and marshal. *Vide articuli super chartas*, cap. 3. And,

(a) Mr. Just. Blackstone has concisely, but elegantly and sufficiently enumerated the principal part of these regulations, in the fourth volume of his Commentaries, from page 425 to 427 oct.

5. He also settled the bounds of inferior courts, not only of counties, hundreds, and courts baron ;—which he kept within their proper and narrow bounds, for the reasons given before; and so gradually the common justice of the kingdom came to be administered by men knowing in the laws, and conversant in the great courts of *B. R.* and *C. B.* and before justices itinerant;—but also, by that excellent statute of Westminster 1. cap. 35. he kept the courts of great men within their limits, under several penalties; wherein ordinarily very great incroachments and oppressions were exercised.

The third general observation I make is, he did not only explain, but excellently enforced, *Magna Charta*, by the statute *de tallagio non concedendo*, 34 E. 1.

Fourthly, he provided against the interruption of the common justice of the kingdom, which had too commonly been affected, by mandates under the great seal or privy seal. This he did by the statute of *articuli super chartas*, cap. 6.—which interruptions, notwithstanding *Magna Charta*, had formerly been frequent in use^(a).

Fifthly, he settled the forms, solemnities, and efficacies of *fincs*; confining them to the common pleas, and to justices itinerant; and appointed the place where they brought the records after their circuits; whereby one common repository might be kept of assurances of lands: which he did by the statute *de modo levandi fines*, 18 E. 1.

Sixthly, he settled that great and orderly method, for the safety and preservation of the peace of the kingdom, and suppressing of robberies, by the statute of Winton.

Seventhly, he settled the method of tenures, to prevent multiplicity of penalties, which grew to a great inconvenience; and remedied it by the statute of *quia emptores terrarum*, 18 E. 1.

Eighthly, he settled a speedier way for recovery of debts, not only for merchants and tradesmen, by the statutes of Acton Burnel and *de mercatoribus*, but also for other persons, by granting an execution for a moiety of the lands, by *elegit*.

(a) Edward enacted a law to this purpose, but it is very doubtful, whether he ever observed it. We are sure that scarce any of his successors did. The multitude of these letters of protection were a ground of complaint by the commons in 3 Edw. II.

See Ryley, 525. This practice is declared illegal by the statute of Northampton, passed in the reign of Edward III. but still continued, like many other abuses. There are instances of it so late as the reign of Elizabeth.

Ninthly, he made effectual provision for recovery of advowsons and presentations to churches, which was before infinitely lame and defective by statute Westminster 2. cap. 1.

Tenthly, he made that GREAT ALTERATION in estates, from what they were formerly, by statute Westminster 2. cap. 1. whereby estates of fee-simple, CONDITIONAL AT COMMON LAW, were turned into ESTATES-TAIL, not removeable from the issue by the ordinary methods of alienation (a). Upon this statute, and for the qualifications hereof, are the superstructures built of 4 H. 7. cap. 32. 32 H. 8. and 33 H. 8.

Eleventhly, he introduced quite a new method, both in the laws of Wales, and in the method of their dispensation, by the statute of Rutland (b).

Twelfthly, in brief, partly by the learning and experience of his judges, and partly by his own wise interposition, he silently and without noise, abrogated many ill and inconvenient usages, both in his courts of justice, and in the country. He rectified and set in order, the method of collecting his revenue in the exchequer, and removed obsolete and illeivable parts thereof out of charge, and by the statutes of Westminster 1. and Westminister 2. Gloucester, and Westminster 3. and of *articuli super chartas*, he did remove ALMOST ALL that was either grievous or impractical, out of the law, and the course of its administration;

(a) By this statute Edward ESTABLISHED a new limitation of property, concerning the good policy of which modern times have, however, entertained a very different opinion. Blac. Com. 4 v. 427. Barring. on Stat. 112. The chief obstruction to the execution of justice in those times, was the power of the great barons; and Edward was perfectly qualified, by his character and abilities, to keep those tyrants in awe, and to restrain their illegal practices. This salutary purpose was accordingly the great object of his attention; yet he was imprudently led into a measure which tended very much to increase and confirm their exorbitant authority. He passed the statute of Westminster, which by allowing them to entail their estates, made it impracticable to diminish the property of the great families, and of consequence left them every mean of increase and acquisition.

By the words of the statute *de donis*, a perpetuity was created, and the donee was restrained either from alienation or forfeiture. In a short time it was manifest that this restriction, was not only inconsistent with the reasons of the common law, but repugnant to every idea of sound policy. The great, however, were unwilling to make any parliamentary alteration in the law, and therefore the judges, in the time of Edward IV. encouraged the finesse of a COMMON RECOVERY, in order to bar the entail; the judges conceiving the case of a common recovery not to be within the operation of the statute. Another wound given to these perpetuities was, by the statute 4 H. VII. cap. 24. which made a fine with proclamations, a bar to the issue in tail, and so repealed that clause of the statute *de donis*, *quod finis ipso jure sit nullus*. See note (C) on cap. 8.

(b) See post. cap. 9.

and substituted such apt, short, pithy, and effectual remedies and provisions, as by the length of time, and the experience had of their convenience, have stood ever since, without any great alteration ; and are now, as it were, incorporated into, and become a part of the common law itself.

Upon the whole matter, it appears, that the very scheme, mould and model of the common law, especially in relation to the administration of common justice, between party and party, as it was highly rectified and set in a much better light and order by this king, than his predecessors left it to him ; so in a very great measure it has continued the same in all succeeding ages, to this day (*a*). So that the mark, or epocha, we are to take for the true stating of the law of England, WHAT IT IS, is to be considered, stated, and estimated, from what it was when this king LEFT it. Before his time, it was in a great measure, rude and unpolished, in comparison of what it was, after his reduction thereof. And on the other side, as it was thus polished and ordered by him, so has it stood hitherto, without any great or considerable alteration ; abating some few additions and alterations which succeeding times have made, which, for the most part, are in the subject matter of the laws themselves, and not so much in the rules, methods, or ways of its administration.

As I before observed some of those many great accessions to the perfection of the law under this king, so I shall now observe some of those boxes or repositories, where they may be found ; which are of the following kinds, viz.

First, the acts of parliament in the time of this king ; which are full of excellent wisdom and perspicuity, yet brevity. But of this, enough before is said.

Secondly, the judicial records in the time of this king. I shall not mention those of the chancery, the close-patent and charter-rolls, which yet will very much evidence the learning and judgment, of that time : but I shall mention the rolls of judicial proceedings, especially those in the king's bench and common-pleas, and in the eyres. I have read over many of them, and do generally observe,

1. that they are written in an excellent hand.

(*a*) Blac. Com. 4 v. 427. There Henry VIII. there happened very cannot be a better proof of the excellence of Edward's constitutions, few, and those not very considerable alterations in the legal forms of proceedings. than that from his time to that of

2. That the pleading is **VERY SHORT**, but **VERY CLEAR AND PERSPICUOUS**; neither loose or uncertain, nor perplexing the matter either with impropriety, obscurity, or multiplicity of words. They are clearly and orderly digested, effectually representing the business that they intend (*a*).

3. That the title and the reason of the law upon which they proceed, (which many times is expressly delivered upon the record itself) is perspicuous, clear, and rational. So that their **SHORT AND PITHY PLEADINGS AND JUDGMENTS**, do far better render the sense of the business, and the reasons thereof, than those long, intricate, perplexed, and formal pleadings, that oftentimes, of late, are **UNNECESSARILY** used.

Thirdly, the reports of the terms and years of this king's time, a few broken cases whereof, are in Fitzherbert's Abridgment. But we have no successive terms or years thereof, but only ancient manuscripts, perchance, not running through the whole time of this king. Yet they are **VERY GOOD**, but **VERY BRIEF**. Either the judges then spoke less, or the reporters were not so ready-handed, as to take all they said. Hence this brevity makes them the more obscure. But yet in those brief interlocutions, between the judge and the pleaders, and in their definitions, there appears **A GREAT DEAL OF LEARNING AND JUDGMENT**. Some of these reports, though broken, yet the best of their kind, are in Lincoln's-Inn library.

Fourthly, the tracts written or collected in the time of this wise and excellent prince; which seem to be of two kinds, viz. such as were only the tractates of private men, and therefore had no greater authority than private collections, yet contain much of the law then in use; as *Fleta*, the *Mirror*, *Britton*, and *Thornton*; or else, secondly, they were sums, or abstracts, of some particular parts of the law; as, *Novæ Narrationes*, *Magna et Parva*, *Cadit Assisa summa*, *De Bastardiu summa*: by all which, compared even with Bracton, there appears a growth and a perfecting of the law into a greater regularity and order (*b*).

(*a*) "It is worthy of observation, (says sir Edward Coke) that in the reigns of Edward the Second, Edward the First, and upwards, the pleadings were plain and sensible, but nothing curious; evermore having chief respect to the **MATTER**, and not to forms of words. But even in those days, the forms of the Register of original writs, were then punctually observed, and matters in law excellently debated and resolved." 1 Inst. 304. a.

(*b*) The chief advantage which the people of England reaped, and still continue to reap, from the reign of this great prince, was the correction,

And thus much shall serve for the several periods, or growth, of the common law, until the time of Edward I. inclusively. Wherein having been somewhat prolix, I shall be the briefer in what follows; especially seeing that from this time downwards, the books and reports printed, give a full account of the ensuing progress of the law.

extension, amendment, and establishment of the laws, which Edward maintained in great vigour, and left much improved to posterity; for the works of wise legislators commonly remain, while the acquisitions of conquerors often perish with them. This merit has justly gained to Edward, the appellation of the English JUSTINIAN. Not only the numerous statutes passed in his reign, touch the chief points of jurisprudence, and, according to sir Edward Coke,* truly deserve the name of establishments, because they were more constant, standing, and durable laws than any made since; but the regular order of his administration, gave an opportunity to the common law to refine itself, and brought the judges to a certainty in their determinations, and the lawyers to a precision in their pleadings.

For the tracts mentioned by Sir Matthew Hale, and those "sums or abstracts" to which he alludes, the student will find sufficient information, in Nich. hist. libra.

* 2 Inst. 156.

CHAP. VIII.

A brief continuation of the progress of the laws, from the time of king Edward II. inclusive, down to these times.

HAVING in the former chapter, been somewhat large in discoursing of the progress of the laws, and the incidental additions they received in the several reigns of king William II. king Henry I. king Stephen, king Henry II. king Richard I. king John, king Henry III. and king Edward I.—I shall now proceed to give a brief account of the progress thereof, in the time of Edward II. and the succeeding reigns, down to these times.

Edward II. succeeded his father. Though he was an unfortunate prince, and by reason of the troubles and unevenness of his reign, the very law itself had many interruptions, yet it held its current, in a great measure, according to that frame and state that his father had left it in.

Besides the records of judicial proceedings in his time, many whereof are still extant, there were some other things that occurred in his reign, which give us some kind of indication of the state and condition of the law during that reign. As,

First, the statutes made in his time, especially that of 17 E. 2. stiled *DE PREROGATIVA REGIS*; which though it be called a statute, yet for the most part is but a sum, or collection, of certain of the king's prerogatives, that were known law long before. As for instance, the king's wardship of lands *IN CAPITE*, attracting the wardship of lands held of others; the king's grant of a manor, not carrying an advowson appendant, unless named; the king's title to the escheat of the lands of the Normans, which was in use from the first defection of Normandy under king John; the king's title to wreck, royal fish, treasure trove, and many others; all of which were ancient prerogatives to the crown (a).

(a) Vide Barring. on Stat. 179. seq. —Bacon on Seld. c. 64. fo. 137. says

Secondly, the reports of the years and terms of this king's reign. These are not printed in any one entire volume, or in any series or order of time; only in some **BROKEN CASES** thereof in Fitzherbert's Abridgment, and in some other books dispersedly. Yet there are many entire copies thereof abroad, very excellently reported; wherein are many resolutions agreeing with those of Edward the First's time. The best copy of these reports that I know now extant, is that in Lincoln's-Inn library, which gives a fair specimen of the learning of the pleaders and judges of that rime (a).

King Edward III. succeeded his father. His reign was long; and **UNDER IT THE LAW WAS IMPROVED TO THE GREATEST HEIGHT.** The judges and pleaders were very learned, and the

that they were collated by agreement between Ed. II. and his people, and so the summary, became, as it were, a statute to future times.

(a) See the first volume of the Year-Books, edit. 1678. intituled, "*Les reports des cases argue & adjudge in le temps del' roy Edward le second. Solonq; les ancient manuscripts ore remanent en les maines de sir Jehan' Maynard chevalier, serjeant de la ley al sa tres excellent majesty le roy Charles le second.*"—This is the old book of reports "of the years and terms" of Edward the Second, to which Hale alludes; and it is probable that these reports were first published in consequence of his recommendation, in the case of Sacheverell and Frogatt, Mich. 23 Car. II. reported in 2 Saund. 367. 1 Vent. 148. 161. 2 Keb. 798. 819. 833. 839. T. Raym. 213. Mr. Selden, to whom knowledge of this kind was perfectly familiar, says the compiler of these reports was one Richard de Winchedon, who lived in the reign of Edward II.—There is some small variation in the copies. Seld. Dissert. Flot. 528. 529. Ten volumes of the **YEAR-BOOKS, OR OLD REPORTS**, beginning with the reign of Edward the Third, and ending with that of Henry the Eighth, were printed by subscription in the year 1679. To these were afterwards added, the cases which were determined, in the time of Edward the Second, and collected by Serjeant Maynard. This valuable collection was produced from

the joint labours of many learned men; of men who were particularly chosen to take notes of all that judicially occurred and was decided. These notes were not only communicated to, but, if they required it, were corrected by, the judges. Plowden, one of the most valuable of our reporters, says, that these books were collected by four able men, especially appointed for the purpose, and who were annually rewarded by the king. See pref. 3. Rep. Dugd. cap. xxiii. Nicholson, iii. 178. Tyrrel. Int. ci. Mr. Justice Blackstone says they "were taken by the prothonotaries, or chief scribes of the court, at the expence of the crown, and published annually, whence they are known under the denomination of the Year-Books." Com. 1 v. 72. This opinion may be right, but the learned judge has omitted to make mention of the authority which induced him to entertain it. Sir Edward Coke, in the preface to his Third Report, remarks, that "the kings of this realm, that is to say, E. 3. H. 4. H. 5. H. 6. E. 4. R. 3. and H. 7. did select and appoint four discreet and learned professors of law, to report the judgments and opinions of the reverend judges:" but takes no notice of their being either "the prothonotaries" or "chief scribes of the court;" or that their reports were "published annually." "Out of these old fields" (adds Sir Edward) springs the new "corn."

pleadings are somewhat more polished than those in the time of Edward I.—Yet they have neither UNCERTAINTY, PROLIXITY, NOR OBSCURITY. They were PLAIN AND SKILFUL; and in the rules of law, especially in relation to real actions, and titles of inheritance, VERY LEARNED AND EXCELLENTLY POLISHED, and exceeded those of the time of Edward I.: so that at the latter end of this king's reign, the law seemed to be near its meridian(*a*).

The reports of this king's time, run, from the beginning, to the end of his reign; excepting some few years between the 10th and 17th, and 30th and 33d years of his reign. But those omitted years are extant in many hands, in old manuscripts(*b*).

The BOOK OF ASSIZES is a collection of the assizes that happened in the time of Edward III. being, from the beginning to the end, extracted out of the books and assizes of those that attended the assizes in the country(*c*).

The justices itinerant, continued by intermitting vicissitudes, till about the 4th of Edward III. and some till the 10th of Edward III. Their jurisdiction extended to pleas of the crown, or, criminal causes, civil suits and pleas of liberties, and *quo warranto*'s. The reports thereof are not printed, but are in many hands in manuscript, both of the times of Edward I. Edward II. and Edward III. full of excellent learning. Some few broken reports of those eyres, especially of Cornwall, Nottingham, Northampton, and Derby, are collected by Fitzherbert in his *Abridgment*.

After the 10th of Edward III. I do not find any justices *errant ad communia placita*, but only *ad placita forestæ*. Other things, that concerned those justices itinerant, were supplied and transacted in the common bench for *communia placita*;—in the king's bench

(*a*) "In the reign of Edward III. pleadings (in the opinion of sir Edward Coke) grew to perfection, both without lameness and curiosity; for then the judges and professors of the law, were excellently learned, and then knowledge of the law flourished: the serjeants of the law, &c. drew their own pleadings, and therefore, truly said that reverend justice Thirning, in the reign of Henry IV. that in the time of Edward III. the law was in a higher degree than it had been any time before; for before that time the manner of plead-

ing was but feeble, in comparison of that it was afterwards, in the reign of the same king."—1 Inst. 304. b.—and yet in the case of *Hering v. Blacklow*, Cro. El. 30. the justices are stated to have said, that in the time of Ed. III. the judges had no great regard to pleading.

(*b*) Probably they were all printed in Maynard's edition of the Year-Books.

(*c*) Vide "*Le Livre des Assises*," which is the fifth volume of the Year-Books, ed. 1679.

and exchequer for *placita de libertatibus*;—and before justices of assize, *nisi prius*, *oyer* and *terminer*, and gaol delivery, for assizes and pleas of the crown.

And thus much for the law in the time of Edward III. (A)

Richard II. succeeding his grandfather, the dignity of the law, together with the honour of the kingdom, by reason of the weakness of this prince, and the difficulties occurring in his government, SEEMED SOMEWHAT TO DECLINE; as may appear by

(A) The old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III. and justices of the peace established instead of the latter; whose jurisdiction can only be taken away by *express* words. 3 T. R. 279. In the reign also of Edward the third, the parliament “is supposed most probably to have assumed its present form, “by a separation of the commons from the lords.” It is remarked by an elegant historian *, that conquerors, though usually the bane of human kind, proved often, in the feudal times, the most indulgent of sovereigns. They stood most in need of supplies from their people; and not being able to compel them by force to submit to the necessary impositions, they were obliged to make them some compensation, by equitable laws and popular concessions. This remark is in some measure, though imperfectly, justified by the conduct of Edward III. He took no steps of moment, without consulting his parliament, and obtaining their approbation, which he afterwards pleaded as a reason for their supporting his measures †. The parliament therefore rose into greater consideration during his reign, and acquired a more regular authority than in any former times; and even the house of commons, which, during turbulent and factious periods, was naturally oppressed by the greater power of the crown and barons, began to appear of some weight in the constitution.

The statute, for defining and ascertaining treasons, was one of the first productions of this new-modelled assembly. One of the most popular laws enacted by any prince, was the statute which passed in the twenty-fifth of this reign ‡, and which limited the cases of high treason, before vague and uncertain, to three principal heads,—the conspiring the death of the king, the levying war against him, and the adhering to his enemies; and the judges were prohibited, if any other cases should occur, from inflicting the penalty of treason, without an application to parliament. The bounds of treason were indeed so much limited by this statute, which still remains in force without any alteration, that the lawyers were obliged to enlarge them, and to explain a conspiracy for levying war against the king, to be equivalent to a conspiracy against his life; and this interpretation, seemingly forced, has, from the necessity of the case, been tacitly acquiesced in. Mr. Justice Blackstone has enumerated some other legal improvements, which were effectuated under the auspices of this brave and indulgent sovereign §.

* Dr. Robertson's Hist. Scot. lib. 1.

† Cotton's Abridg. p. 108, 120.

‡ Chap. 2.

§ Blac. Com. 4 v. 428.

comparing the twelve last years of Edward III. commonly called *quadragesms*, with the reports of king Richard II. wherein appears a visible declination of the learning and depth of the judges and pleaders.

It is true, we have no printed, continued report, of this king's reign. But I have seen the entire years and terms thereof, in a manuscript; out of which, or some other copy thereof, I suppose Fitzherbert, abstracted those broken cases of this reign, in his Abridgment.

In all those former times, especially from the end of Edward III. back to the beginning of Edward I. the learning of the common law consisted principally in assizes and REAL ACTIONS. Rarely was any title determined in any personal action; unless in cases of titles to rents, or services, by replevin. And the reasons thereof were principally these, viz.

First, because these ancient times were great favourers of THE POSSESSOR; and therefore, if about the time of Edward II. a disseisor had been in possession, by a year and a day, he was not to be put out, without a recovery by assize. Again, if the disseisor had made a feoffment, they did not countenance an entry upon the feoffee, because thereby he might lose his warranty, which he might save, if he were impleaded in an assize or writ of entry. By this means, real actions were frequent, and also assizes.

Secondly, they were willing to quiet men's possessions. And therefore after a recovery, or bar, in an assize or real action, the party was driven to an action of a higher nature.

Thirdly, because there was then no known action, wherein a person could recover his possession, other than by an assize or a real action. For till the end of Edward IV. the possession was not recovered in an *ejectionæ firmæ*; but ONLY DAMAGES.

Fourthly, because an assize was a speedy and effectual remedy to recover a possession; the jury being ready impanelled and at the bar, the first day of the return. And although by disusage, the practicers of law, are not so ready in it, yet the course thereof, in those times, was as ready and as well known to all professors of the law, as the course of *ejectionæ firmæ* is now (B).

(B) "All the law concerning disseisins existed and was in practice prior to the assize of *novel disseisin*. The assize was introduced, probably from the usage of Normandy, for the *Grand Coutumier* treats of assizes in or before the reign of Henry the second. Glanville, who wrote in that reign, calls the great

assize a benefit *clementiam principis de consilio procerum populis indulgam.*" And the Myrrour * says "Glanville introduced it."

Seisin is a technical term, to deter the completion, of that investiture, by which the tenant was admitted into the tenure; and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse.*

Disseisin therefore must mean, some way or other, turning the tenant out of his tenure; usurping his place and feudal relation. At this time no tenant could alien without licence of the lord. When the lord consented, the only form of conveyance, was by feoffment publicly made, *coram paribus curie*, with the lord's concurrence. Homage or fealty was solemnly sworn; and suit of court and services were frequently done. The freeholder represented the whole fee; did the duty to the lord; and defended the whole fee against strangers.

The freehold never could be in abeyance, because the lord could never be at a loss to know, upon whom to call as his tenant; nor a stranger to know against whom to bring his *præcipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted, and did suit and service as such, many privileges were allowed to innocent persons, deriving title from the freeholder *de facto*.

If the disseisor died after one year's nonclaim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The stat. of 32. H. 8. cap. 33. requires five year's nonclaim. The feoffee of a disseisor acquired title of possession at this time by one year's nonclaim. The descent to his heir remains privileged as it was at common law; for the 32. Hen. 8. cap. 33. extends not to any feoffee of the disseisor, immediate or mediate. The feoffee of a disseisor was favoured, because he came innocently into the tenure, by a solemn public investiture, with the lord's concurrence.

But the statute "*quia tempores terrarum*"† (which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the king, as of an honour or manor) and other statutes which extended the power of alienation to the king's tenant *in capite*; the frequent releases of feudal services; the statutes of uses, and of wills; and, at last, the total abolition ‡ of all military tenures, have left us little but the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the thing originally signified by those sounds. The idea which modern times annex to freehold or freeholder, is taken merely from the duration of the estate. Copyholds, and the customary freeholds in the North, retain some faint traces, in imitation of the old system of feudal tenures. It is obvious, how a man may visibly be the copyholder or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that usurping such a tenure, is a different fact from the naked possession or occupation of the land. But whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisins, upon every change of a tenant, by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that at the time alluded to, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

* C. 2. Sec. 25. pa. 150. Edit. 1642. † 18 E. 1. § 12. C. c. 23. and 13. C. 2. c. 7.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin, differed from a possessor by wrong. Bracton, *De Assisa Nova Disseysina*, puts many cases of possession wrongfully taken, which he calls intrusion, because there is no disseisin. "*Possessio quæ nuda est omnino, et sine aliquo vestimento; quæ dicitur intrusio.*" VESTIMENTO is seisin, investiture; (from whence the Saxon term *vest*) a metaphor which the feudists took from clothing, and by which they meant to intimate, "that naked possession was clothed with all the solemnities of a feudal tenure." A particular tenant, according to feudal notions, was in, as of the seisin of the fee, of which his estate was a part. If he aliened the fee (which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held), he forfeited his particular estate, for having betrayed the seisin with which he was entrusted. But on account of the privity and confidence between him and the reversioner, and the notorious solemnity of the act of investiture, his feoffment disseised the reversioner.

Bracton, who wrote in the reign of Henry III. before tenants could alien without licence, mentions the disseisin in this case as a necessary consequence, and as a thing which could not possibly be otherwise.

"Item facit quis Disseysinam, cum quis in seysina fuerit ut de libero tenemento & ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo; alium feoffaverit, in prejudicium veri domini, & fecerit alteri liberum tenementum; cum duo simul & *semel*, de eodem tenemento & in solidum, esse non possunt in seysina." He considers it as impossible for the true tenant not to be put out, when another actually came into his place.

So late as the 32d of Eliz. in the case of *Matheson v. Trot*, 1 Leon. 209, the distinction upon which the judgment turns is, "that Henry Denny gained a wrongful possession in fee; but did not gain any seisin, so no disseisor, therefore the descent to his heir is not privileged." Nobody can disseise the king; neither can any one be disseised to the use of the king. The king may be wrongfully dispossessed: but the intruder's injurious possession is *sine aliquo vestimento*, and called intrusion. The king cannot be made a disseisor, not because it is wrong, for he may, in fact, withhold the possession of land from a subject, contrary to right. But the reason seems, according to the feudal system, to be this: A subject never could stand in the king's seisin or tenure; and the king never could be in the feudal relation of a subject. By that policy, all real property was held mediately or immediately of the king. In the king himself, all real property was allodial. The precise definition of what constituted disseisin, which made the disseisor, the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known; but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we are confounded. For, after the assize of *novel disseisin* was introduced, the legislature, by many acts of parliament, and the courts of laws by liberal constructions, in furtherance of justice, extended this remedy, for the benefit of the owner, to every trespass or injury done to his real property; if by bringing his assize he thought fit to admit himself disseised.

It lay against advisers, aiders, or abettors, who were not tenants. Co. Lit. 180. b. It lay against the tenant who was no disseisor; as the heir of a disseisor or his feoffee. Stat. Gloucester. It lay for the owner, against the

disseisor of the disseisor. The tenant's not being ready to pay rent-seck when demanded, was, for the benefit of the owner's remedy, a disseisin. Lit. sect. 233. It lay for outrageous distress. 2 Inst. 412. It lay against guardian, or particular tenant, who made a feoffment, as well as against their feoffees 2 Inst. 413. The stat. of Westm. 2. c. 25. extends it to a man's depasturing the ground of another; or taking fish, in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style 407. If a guardian assigns dower to a woman not dowable, the owner may elect to make her a disseisor, 24 Ed. 3. 43. cited in Cro. Car. 203. In a word, for the sake of the remedy, as between the true owner and the wrong doer, to punish the wrong; and, as between the true owner and naked possessor, to try the title, the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of assize can only relate to cases where the owner admits him self disseised.

The law books treat of disseisin, with a view to the assize; which was the common method of trying titles, till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statute and by equitable construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize.

These are the common authorities from whence descriptions have been cited of a disseisin. The definitions in the books, though very imperfect, savour often of that which originally was an ACTUAL disseisin in spite of the owner.

Littleton in sect. 279, defines disseisin with an &c. "Where a man entereth into lands or tenements, where his entry is not congeable, and ousteth him which hath the freehold, &c." The comment says, "Every entry is no disseisin, unless there be an ouster of the freehold;" and Co. Lit. 153. b. says "Disseisin is putting a man out of seisin, and ever implies a wrong: but disseisin or ejectment is putting out of possession, and may be by right or wrong. *Disseisin est un personal trespass de tortious ouster del seisin.*"

Though the term "disseisin," used, happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin, or disseisin by election, is very different. The distinction of disseisin AT ELECTION, is made in the case of *Blunden v. Baugh*, Cro. Car. 303. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held, "that the lessee for years of the tenant at will, was a disseisor AT THE ELECTION OF THE ORIGINAL LESSOR, for the sake of his remedy, but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons." If a *præcipe* was brought against him, he might say, "I am not tenant to the freehold." When the easy specific remedy was by assize, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a disseisin. So, since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession.

Where an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease; but there is no real or supposed re-entry after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without

an actual re-entry. If the lessee for life or years makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid, as a receiver, or bring an ejectment, and choose whether he will be considered as disseised. Metcalf on the demise of Kynaston v. Parry and others, a case reserved at Salop assizes, 25th March 1742, for the opinion of the Court of Exchequer (who gave judgment in it on the 24th of November 1743), was thus: Tenant in tail of lands leased by his father to a second son, for lives, (under a power) upon his father's death received the rent from the occupier, as owner, and as if no such lease had been made, during his whole life. He suffered a common recovery. It was holden, "that this was only a disseisin of the freehold at election; that therefore he could not make a good tenant to the *præcipe*." And the recovery was adjudged bad.

Except the special case of fines with proclamations, which stands entirely upon distinct grounds, the construction of the stat. of 4 Hen. 7. c. 24. one can scarce suggest a case where the true owner, whose entry is not taken away, may not elect, by pursuing a possessory remedy, to be deemed as not having been disseised.

The consequence of actual disseisins, considered as such, continue law to this day. The disseised cannot dispose or devise; the descent takes away his entry. There are two cases cited in the case of Blunden v. Baugh, material to this point. Pousley v. Blackman, B. R. Trin. 18. Jac. Rot. 1230. Palmer 201*. The case, in effect and operation, was this: Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will, at the election of the original lessor was a disseisin, yet they adjudged his devise good; because he had not elected to admit himself disseised, and by making a will intimated the contrary.

Another case was in the 14th of Eliz.—Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William, afterwards, a certain rent, claiming to hold as tenant at will, and died. His heir entered; upon whom Sir William entered. It was adjudged, "that at the election of Sir William, Sir Ambrose was a disseisor; but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin, and consequently the descent no bar to his entry."

In the case of Pousley v. Blackman, Palmer 205, it is said, "If a disseisee devise and afterwards enter, the devise is good." This Dodderidge denied, and said there must be a new publication; which seems right, if there ever was a disseisin; for where an actual entry is necessary, it will not make good a conveyance made before: as was holden in B. R. & Dom. Proc. in the case of Berrington v. Parkhurst†. The actual entry could not support the lease made before. Yet in Salk. 237‡, it is agreed, "the devise is good, because he was seised *ab initio*, so as he might bring trespass:" *i. e.* he never was disseised at all, by his election; and he might make that election, without an entry; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in!

In the case of Pousley v. Blackman, there was no entry; and after much argument, it was at last resolved, unanimously, by the whole Court, from the

* Cro. Jac. 659. S. C.

‡ Bunter v. Coke.

† A. D. 1738.

inconveniences which would be introduced if a lessee, by a secret contract with a stranger, could defeat the will of his lessor, "that the devise was good," and that the owner, by making a devise, shewed his election not to be disseised.

Taking possession under a judgment in ejectment, never can be a disseisin of the freehold. Suppose it a real proceeding, the termor of a disseisee might, at the old law, recover against the disseisor. He might recover against the feoffee of his lessor; but he never could thereby become a disseisor of the freehold; he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of a freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee; if the lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had the right of possession.

Suppose the proceeding, as it is, a fictitious remedy; then in truth and substance a judgment in ejectment, is a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed, according to right, *proul lex postulat*.

If he has a freehold, he is in as a freeholder. If he has a chattel-interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser; and without any re-entry by the true owner, is liable to account for the profits.

The true owner may enter upon a disseisor, but after judgment in ejectment, an actual entry would not be permitted. An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter. Therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession; and every plaintiff in ejectment must shew a right of possession, as well as of property*.

There is an excellent analysis of real actions, in the first volume of Comyns's Digest; after which the student may consult Fitzherbert's *Natura Brevium*, with Sir Matthew Hale's Commentary, and the tenth and eleventh chapters of the third book of Mr. Justice Blackstone's Commentaries.

In addition to our author's progress of the law under the reign of Richard the Second, it is proper to remark, that the statutes of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the precedent reign. The establishment also of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century; though the seeds of the general reformation which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution introduced into the laws of the land by the influence of the regular clergy†. It was usual at this time for the Church, that they might elude the mortmain act‡, to make their votaries leave

* See the case of Taylor, ex dm. Atkyns v. Horde, *passim*, 1 Burr. 60. 13 Ed. 1. c. 32. 18 Ed. 1. st. 1. c. 3. 27 Ed. 1. st. 2. 34 Ed. 1. st. 3. 18 Ed. 3.

† Blac. Com. 4 v. 428.

‡ M. C. 9 H. 3. c. 36. 7 Ed. 1. st. 2.

st. 3. c. 3. 15 R. 2. c. 8.

Touching the reports of the years and terms of Henry IV. and Henry V. I can only say, they do not arrive, either in the nature of the learning contained in them, or in the judiciousness and knowledge of the judges and pleaders, nor in any other respect, arise to the perfection of the last twelve years of Edward III.

But the times of Henry VI. as also of Edward IV. Edward V. and Henry VII. were times that abounded with learning and excellent men. There is little odds in the usefulness or learning of these books; only the first part of Henry VI. is more barren, spending itself much in learning of little moment, and now out of use. But the second part is full of excellent learning (C).

lands in trust to certain persons, under whose names the clergy enjoyed the benefit of the bequest. The parliament stopped the progress of this abuse * : To die without bestowing a portion of worldly wealth to pious uses, was held an indirect fraud on the Church, which she punished by taking the administration of the effects into her own hands. This however was peculiar to England, and seems to have been the case here only, between the reigns Henry III. and Edward III. when the Bishop took a portion of intestate estates, for the advantage of the church and poor, instead of distributing it among the next of kin. In France, the lord of the fief, seems to have taken the whole spoil †. The greatest novelty introduced into the civil government during this reign, was the creation of peers by patent. The lord Beauchamp of Holt, was the first peer who was advanced to the house of lords in this manner. Though he was summoned, he never sat. His patent, however, could never have been deemed valid, because Michael de la Pole, was the lord Chancellor who affixed the seal to it, which had been before taken from him by act of parliament, and he declared incapable of ever having it again. This, then, was a single and ineffectual attempt to create a new peer, without the assent of parliament, which was the usual way; above thirty having been made so in that very reign. His successors were too wise to follow this example, for every barony newly created, till the union of the Roses, which were about fourteen, were every one of them, as appears on the face of the patents, by authority of parliament, if we except two or three; and even these, on a close examination, will appear not to be new baronies, but re-grants of old feudal baronies by tenure; which undoubtedly were all in the sole disposition of the king ‡.

* Knyghton, 27. 38. Cotton, 355.

† Selden Tit. Hon. part 2. chap. 5.

‡ Seld. vol. 3. p. 1676. Flynne's Constitutions, vol. 3. p. 18. Du Cange v. Intestatus.

(C) From the time of Richard the Second, to that of Henry the Seventh, the civil wars and disputed titles to the crown, gave no leisure for farther juridical improvement; "*nam silent leges inter arma*;" and yet to these very

In the times of those three kings, Henry VI. Edward IV. and Henry VII. the learning seems to be much alike. But these two

disputes we owe the happy loss of all the dominions of the crown on the continent of France: which turned the minds of subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails, by the fiction of common recoveries, invented originally by the clergy to evade the statute of mortmain, but introduced under Edward the Fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of uses, another of the clerical inventions*.

The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it.

Nothing could be more agreeable to the law of tenures, than a male fee unalienable. But this bent to set property free, allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the statute *de donis* repeated what the law of tenures said before, "that the tenor of the grant should be observed," than the same bent permitted tenant in tail of the freehold and inheritance, to make an alienation voidable only, under the name of a discontinuance. But this was a small relief.

At last, the people having groaned for 200 years, under the inconvenience of so much property being unalienable, and the great men, to raise the pride of their families, and in those turbulent times to preserve their estates from forfeitures, preventing any alteration by legislative authority, the same bent threw out a fiction in Taltarum's case †, by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might aliene absolutely. Public utility adopted and gave sanction to the doctrine, for the real political reason, "TO BREAK ENTAILS." But the ostensible reason, from "the fictitious recompence," hampered succeeding times how to distinguish cases which were within the false reason given, but not within the real policy of the invention: till at last the legislature, applauded common recoveries, and lent its aid by the acts of 11 H. 7. c. 20. 33 Hen. 8. c. 31. 34 & 35 Hen. 8. c. 20. 14 Eliz. c. 8. and 14 Geo. 2. c. 20. which last is a retrospective and declaratory law, and seems to have restored the original tenant to the *precipue*.

As the legislature has for ages avowed the proposition, we may now say, that COMMON RECOVERIES ARE A MERE FORM OF CONVEYANCE. All necessary circumstances of form and ceremony are taken from its fictitious original. The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property.

Alienations were allowed, yet in such a shape as necessarily required deliberation and delay; and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with consent of the owner of the first estate for life. The eldest son was restrained in the lifetime of his father,

* Blac. Com. 4 v. 428.

† Pigott on Common Recoveries, p. 7, 8, 9, 10.

are observable in them, and indeed generally in all reports
the time of Edward III. viz.

er, or any other ancestor or relation, seised for life, under a family
nt.

a termor after the 4th of Henry VII. made a feoffment, and levied a
proclamations, and insisted upon five years non-claim, the Judges with
ense said, though a feoffment by tenant for life, or years, or at will, is a
, it shall not operate as a disseisin, to enable the termor himself to bar
ritance, by a fine with proclamations, according to the 4 H. 7. c. 20.
y they, "it was never the intent of the makers of the act, that those
could not levy a fine, should by making an estate by wrong and fraud,
abled to bar those who had right. For if they themselves without
fraudulent estate could not levy a fine to bar those who had the free-
and inheritance, certainly the makers of the 4th H. 7. c. 20. did not
l, that by making of an estate by fraud and practice, they should have
r to bar them; and such fraudulent estate is as no estate, in the judg-
of the law." So as to a common recovery, it was never the intent,
se who could not suffer a recovery should, by making an estate by
nd fraud, be enabled to bar those in remainder or reversion, who had

For if they themselves, without such fraudulent estate, could not
recovery to bar those in remainder and reversion, certainly the framers
qualified species of alienation did not intend, that by making an estate
l and practice, they should have power to bar them; for a common
y, which the parties have no power to suffer directly, cannot be made
/ wrong and fraud.

the statute *de donis*, tenant in tail in remainder, with the concurrence
reeholder, might make a voidable alienation by discontinuance; but he
ot acquire to himself that privilege by an injurious entry and feoff-
Co. Lit. 347. Hob. 323. If, in cases of recoveries, stratagem should
redress would follow too late*.

arkable law passed in the reign of Henry VI. for the due election of
s of parliament in counties. After the fall of the feudal system, the
ion of tenures was in a great measure lost: and every freeholder, as
se who held of mesne lords, as the immediate tenants of the crown,
degrees admitted to give their votes at elections. This innovation
firmed by a law of Henry the Fourth †, which gave right to such a
de of electors as was the occasion of great disorder in the eighth and
f this king; therefore, laws were enacted, limiting the electors to
possessed forty shillings a-year in land, free from all burden within the
‡. This sum was equivalent to near twenty pounds a-year of our
money; and it were to be wished, that the spirit, as well as letter
aw, had been maintained.

preamble of this statute is remarkable. "Whereas the elections of
its have of late, in many counties of England, been made by outrageous
cessive numbers of people, many of them of small substance and value,

lord Mansfield, in the case of Tay-
n. Atkins v. Horde, 1 Bur. 60.

† Stat. at large, 7 Hen. 4. cap. 13.

‡ 8 Hen. 6. cap. 7. 10 Hen. 6. cap. 2.

First, that real actions and assizes were not so frequent as formerly; but many titles of land were determined in personal actions; and the reasons hereof seem to be,

“ yet pretending to a right equal to the best knights and esquires; whereby
 “ manslaughter, riots, batteries, and divisions among the gentlemen and other
 “ people of the same counties, shall very likely rise and be, unless due remedy
 “ be provided in this behalf, &c.” We may learn from these expressions
 what an important matter the election of a Member of Parliament was now
 become in England. That assembly, was beginning in this period, to assume
 great authority. The commons had it much in their power to enforce the
 execution of the laws; and if they failed in their duty, in this particular, it
 proceeded less from any exorbitant power of the crown, than from the licen-
 tious spirit of the aristocracy, and perhaps from the rude education of the age,
 and their own want of a due sense of the advantages resulting from a regular
 administration of justice.

As to the reign of Henry the Seventh, his ministers (not to say the king
 himself) were more industrious (in the opinion of Blackstone) in hunting out
 prosecutions upon old and forgotten penal laws, for the mean and disgraceful
 purpose of extorting money from the subject, than in framing any new and
 beneficial regulations. For the distinguishing character of this reign was,
 (says the commentator,) that of amassing treasure in the king's coffers, by
 every means that could be devised: and almost every alteration in the laws,
 however salutary or otherwise in their future consequences, had this, and
 this only, for their great and immediate object*. The capacity of Henry was
 excellent, but in some degree contracted by the narrowness of his heart. Avarice
 was his ruling passion; and he remains an instance, almost singular, of
 a man placed in an high station, and possessed of talents for great affairs, in
 whom that passion predominated above ambition. Though the opinion which
 Mr. Justice Blackstone entertains, may probably be right, yet it is but proper
 to remark, that Henry is celebrated by his historian for many good laws,
 which he caused to be enacted for the government of his subjects. It must
 be confessed that several considerable regulations are found among the sta-
 tutes of his reign, as well with respect to the police as the commerce of the
 kingdom. To gratify the insatiable avarice of Henry, the court of star-
 chamber (continues the commentator) “ was new modelled, and armed with
 “ powers the most dangerous and unconstitutional over the persons and pro-
 “ perties of the subject†.” It is true, that early in the reign of Henry, the
 authority of the star-chamber was in some cases confirmed by act of parlia-
 ment‡. Lord Bacon extols the use of this court; but men began, during
 the age of that historian, to feel that so arbitrary a jurisdiction was totally
 incompatible with liberty; and in proportion as the spirit of independence
 rose still higher in the nation, the aversion against it increased, till this “ court
 “ of criminal equity” was entirely abolished, by act of parliament, in the
 reign of Charles the First. Mr. Justice Blackstone enumerates many other
 particulars which were allowed and contrived to increase the riches of the
 sovereign; from whence he infers, that “ there is hardly a statute in this

* Com. 4 v. 429.

† Id. ib.

‡ Rot. parl. 3 II. 7. n. 17.

1st, because the learning of them began, by little and little, to be less known or understood.

2dly, the ancient strictness of preserving possession to possessors till eviction by action, began not to be so much in use; unless in such cases of descents and discontinuances.—The latter necessarily drove the demandant to his formedon, or his *cui in terra*, &c. But the descents that tolled (a) entry were rare, because men preserved their rights to enter, &c. by continual claims.

3dly, because the statute of 8 Hen. VI. had helped men to an action to recover their possessions by a writ of forcible entry; even while the method of recovery of possessions by ejectments was not known or used.

The second thing observable is, that though pleadings in the times of those kings were far SHORTER than afterwards, especially

reign introductory of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.* Let it not be forgotten however, that in this reign suits were given to the poor *formâ pauperis*, as it is called; that is, without the payment of any fees †; good law at all times, especially in that age, when the people laboured under the oppression of the great. But the most important law in its consequences which was enacted during the reign of Henry, was that by which the nobility and the gentry acquired the power of destroying the ancient entails, and of alienating their estates ‡. It is true that the practice was introduced in the reign of Edward the Fourth; but it was not, properly speaking, law, till the statute of Henry the Seventh; which, by correcting some abuses which attended that practice, indirectly gave a sanction to it. By means of this law, combined with the approaching luxury and refinements of the age, the great fortunes of the barons were gradually dissipated, and the property of the commons increased. It is probable that Henry foresaw and intended this consequence; because the constant scheme of his policy consisted in depressing the great, and exalting those who were more dependent on him.—One great check to industry in England was the erecting of corporations; an abuse which is not yet entirely corrected. A law was enacted, that corporations should not pass any bye-laws without the consent of three of the chief officers of state §. And to the praise of this prince it may be observed, that sometimes, in order to promote commerce, he lent to merchants sums of money without interest, when he knew that their stock was not sufficient for those enterprises which they had in view.

* Com. 4 v. 429, 430.

‡ 4 H. 7. c. 24.

† 11 H. 7. c. 12.

§ 19 H. 7. c. 7.

(a) In other words, that *take away* defeat, or take away. See stat. 8 Hen. entry. Blac. Com. 3 v. 176.—the word *roll*, as here applied, meaning, to bar, VI. cap. 9.

after Henry VIII. yet they were much longer than in the time of king Edward III.; and the pleaders, yea and the judges too, became somewhat TOO CURIOUS therein. So that that art, or dexterity of pleading, which in its use, nature and design, was only TO RENDER THE FACT PLAIN AND INTELLIGIBLE, AND TO BRING THE MATTER TO JUDGMENT WITH A CONVENIENT CERTAINTY, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become A PIECE OF NICETY AND CURIOSITY: which how these later times have improved, the length of the pleadings—the many and unnecessary repetitions—the many miscarriages of causes, upon small and trivial niceties in pleading, have too much witnessed (a).

I should now say something touching the times since Hen. VII. to this day, and therefore shall conclude this chapter with

(a) What would sir Matthew Hale have said, had he lived in these times of “nicety and curiosity?”—times in which pleading seems to be involved in all that perplexity can suggest, or prolixity supply! He might, perhaps, impute it to incapacity, or to design; in either light, a reproach to those, whose duty it is, not only to be well informed of the merits of a cause, but to apply the pleadings to the real point in controversy; and that in a mode the most simple and intelligible.—The science of pleading (however those who do not understand, may affect to despise it) is admirably calculated for the purposes of analysing a cause; of extracting, like the roots of an equation, the true points in dispute, and referring them with all imaginable simplicity to the court or to the jury. It is reducible to the strictest rules of pure dialectic; and were it scientifically taught in our publick seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding as effectually as the famed Peripatetic system; which, how ingenious and subtle soever, is not so honourable, so laudable, or so profitable, as the science in which Littleton exhorts his sons to employ their courage and their care. Jones’s *Isæus*, pref. disc. 25. The earl of Mansfield, who, with the most comprehensive and enlightened genius,

possessed the most consummate and enlarged knowledge, remarked, that “the substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained: but by being misunderstood and misapplied, are often made use of as instruments of chicane.” 1 Burr. 319. Though this science, when properly applied, merits every commendation, yet nothing would perhaps more prevent “the many miscarriages of causes,” or more promote the ends of justice, than to enact that the defendant shall in all actions, on giving previous notice of his intended defence to the plaintiff, be permitted to plead the general issue, and give the merits of his case in evidence. Without referring to the numerous cases in which the legislature has already permitted it to be done, it need only be remarked, that in the mixed action of ejectment it is the uniform practice: so in personal actions of considerable importance; as questions arising on mercantile contracts, by insurance, bills of exchange, and the like: so in almost all special actions on the case, and in a great measure even in the common action of *assumpsit*. Lamentable at present is the increase of costs upon the suitor, and that even in cases where he succeeds; an evil, which if not speedily corrected, may in the end be productive of serious consequences.

some general observations touching the proceedings of law in these later times.

And first, I shall begin where I left before, touching the length and nicety of pleadings, which at this day far exceeds not only that short, yet perspicuous, course of pleading, which was in the time of Henry VI. Edward IV. and Henry VII. but those of all times whatsoever, as our vast presses of parchment for any one plea do abundantly witness.

And the reasons thereof seem to be these, viz.

First, because in ancient times the pleadings were drawn AT THE BAR, and the exceptions also taken at the bar: which were rarely taken for the pleasure, or curiosity, of the pleader; but only, when it was apparent, that the omission, or the matter excepted to, was for the most part THE VERY MERIT AND LIFE OF THE CAUSE; and purposely omitted, or mispleaded, because his matter, or cause, would bear no better. But now, the pleadings being first drawn in writing, are drawn to an EXCESSIVE LENGTH, AND WITH VERY MUCH LABORIOUSNESS AND CARE ENLARGED, lest it might afford an exception not intended by the pleader, and which could be easily supplied from the truth of the case; lest the other party should catch that advantage, which commonly the adverse party studies;—not in contemplation of the merits, or justice, of the cause, but to find a slip to fasten upon; though in truth, either not material to the merits of the plea, or at least not to the merits of the cause, if the plea were in all things conformable to it.

Secondly, because those parts of pleading, which in ancient times might perhaps be material, but at this time, are become only mere styles and forms, are still continued with much religion; and so all those ancient forms at first introduced for convenience, but NOW NOT NECESSARY, or it may be, antiquated as to their use, are yet continued as things wonderfully material, though THEY ONLY SWELL THE BULK, and contribute nothing to the weight of the plea.

Thirdly, these pleas being mostly drawn by clerks, who are paid for entries and copies thereof, the larger the pleadings are the more profits come to them; and the dearer the clerk's place, the dearer he makes the client pay (a).

(a) It may be considered as a reproach that the fees of its officers should be proportion to the administration of justice, in proportion to the length of its pro-

Fourthly, an overforwardness in courts to give countenance to frivolous exceptions, though they make nothing to the true merits of the cause; whereby it often happens that causes are not determined according to their merits, but do often miscarry for inconsiderable omissions in pleading (*a*).

But, secondly, I shall consider what is the reason that in the time of Edward I. one Term contained not above two or three hundred rolls, but at this day one Term contains two thousand rolls, or more.

The reasons whereof may be these, viz.

1st, Many petty businesses, as trespasses and debts under 40s. are now brought to Westminster, which used to be dispatched in the county or hundred courts. And yet the plaintiffs are not to be blamed, because at this day those inferior courts are so ill served, and justice there so ill administered, that they had better seek it (where it may be had) at Westminster, though at somewhat more expense (*b*).

2dly, Multitudes of attornies practising in the great courts at

ceedings. In one of the superior courts at Westminster, some of its officers are legally entitled to a fee from the plaintiff in every cause, on the filing of his declaration; a fee which is either greater or less, as the declaration is either long or short: though the officers have no extra (if any) trouble, in the one case or the other; and though no part of the pleadings are now, nor have been for many years, drawn either by themselves or their clerks. This has long been a subject of complaint. Exclusive of the burthen on the suitor, which in many cases is not light, it prevents the court itself from bearing that share of the public business which it is calculated to sustain, and bounden to endure.

By stat. 5 & 6 Ed. 6. c. 16. "against buying and selling of offices," the sale of all offices "which concern the administration or execution of justice, or any clerkship to be occupied in any manner of court of record wherein justice is to be ministered," is positively forbidden: but by a proviso, (s. 7.) the act is not to extend "to any of the chief justices of the king's bench, or common place, or

"to any of the justices of assize." Were this proviso repealed, and an adequate compensation made to the elevated characters in whose favour it was enacted, it would no doubt be grateful to them and beneficial to the public. It would not only silence the clamour of disappointment, but contribute, by wise and popular means, to enforce the true spirit of the act; namely, (as its preamble states), "persons worthy and meet to be advanced, would be preferred, and no other." See the case of *Blackford v. Preston*, 8 T. R. 92. and 49 Geo. 3. c. 126.

(*a*) However pertinent this fourth reason of sir Matthew Hale might have been heretofore, it is not now in the least degree applicable; the courts having been, for many years, and that much to their honour, astute to discountenance and reprove all frivolous exceptions, and to forward as much as possible, the true merits of every cause.

(*b*) This is now in a great degree remedied by the erection of courts of conscience for the recovery of small debts.

Westminster, who are ready at every market to gratify the spleen, spite, or pride of every plaintiff (a).

3dly, A great increase of people in this kingdom above what they were anciently ; which must needs multiply suits.

4thly, A great increase of trade and trading persons, above what there were in ancient times ; which must have the like effect.

5thly, Multitudes of new laws, both penal and others ; all which breed new questions, and new suits at law ; and in particular the statute touching the devising of lands ; *cum multis aliis*.

6thly, The multiplication of actions upon the case, which were formerly, and thereby wagers of law ousted, which discouraged many suits. For when men are sure, that in case they rested upon a bare contract without specialty, the other party might wage his law, they would not rest upon such contracts without reducing the debt into a specialty, if it were of any value ; which created much uncertainty, and accorded many suits.

And herewith I shall conclude this chapter, shewing what progress the law has made, from the reign of king Edward I. down to these times (b).

(a) The number of attornies now (1794) on the rolls of the different courts at Westminster, is almost incredible ; more than two thousand practice within London and its environs.

(b) Mr. Justice Blackstone having, as the most elegant and judicious man-

ner, continued this plan of sir Matthew Hale, from the reign of Henry VII. to that of his present Majesty, I therefore take the liberty of referring the reader to the fourth volume of the Commentaries of that learned judge—from page 429 to 443 inclusive.

CHAP. IX.

Concerning the settling of the common law of England, in Ireland and Wales; and some observations touching the isles of Man, Jersey, and Guernsey, &c.

THE kingdom (*a*) of Ireland being conquered by Henry II. about the year 1171 (*b*), he, in his great council at Oxon, constituted his younger son, John, KING thereof; who prosecuted that conquest so fully, that he introduced the English laws into that kingdom; and swore all the great men there to the observation of the same. Which laws were, after the decease of king John, again reinforced by the writ of king Henry III. reciting that of king John. Rot. Claus. 10 Hen. 3. memb. 8. & 10. Vide infra, & Pryn. 252, 253, &c.

And because the laws of England were not so suddenly known there, writs from time to time issued from hence, containing divers *capitula legum Angliæ*, and commanding their observation in Ireland; as Rot. Parl. 11 Hen. 3.—the law concerning tenancy by curtesy, Rot. Claus. 20 Hen. 3. memb. 3. dorso—the law concerning the preference of the son born after marriage, to the son born of the same woman before marriage, or *bastard eigne & mulier*

(*a*) It was only entitled the dominion, or lordship, of Ireland, (stat. Hiberniæ 14 Hen. III.) and the king's stile was no other than *dominus Hiberniæ*, lord of Ireland, till the thirty-third year of Henry VIII. when he assumed the title of king, which is recognized by act of parliament, 35 Hen. VIII. cap. 3.—Ireland, previous to the union, was a distinct though a dependant, subordinate, kingdom. As to the deduction and change of the king's title in respect to Ireland, see Seld. Tit. Hon. b. 1. c. 4. s. 2.

(*b*) Notwithstanding what hath been said by many historians of the total submission of Ireland to Henry II. sir John Davis, very properly observes,

that this supposed conquest did not extend much further, than the neighbourhood of Dublin.—With what propriety can that be called a conquest, where the conqueror cannot enforce his own regulations?—It was by very slow degrees only, that the Irish were civilized and brought to a state of submission. Bar. Obs. on Stat. 141. The inhabitants of Ireland are for the most part, descended from the English, who planted it as a kind of colony, after the subjugation of it by Henry II.; and the laws of England were then received, and sworn to, by the Irish nation, assembled at the council of Lismore. Pryn. on 4 Inst. 249.

puisne, Rot. Claus. 20 Hen. 3. memb. 4. in dorso : so the law concerning all the parceners inheriting, without doing homage, and several transmissions of the like nature.

For though king Henry II. had done as much to introduce the English laws there, as the nature of the inhabitants, or the circumstances of the times, would permit ; yet partly for want of sheriffs, that kingdom being then not divided into counties, and partly by reason of the instability of the Irish, he could not fully effect his design. And therefore, king John, to supply those defects, as far as he was able, divided Leinster and Munster into the several counties of Dublin, Kildare, Meath, Uriel, Catherlogh, Kilkenny, Wexford, Waterford, Cork, Limerick, Tipperary, and Kerry ; and appointed sheriffs and other officers to govern them, after the manner of England. He likewise caused an abstract of the English laws, under his great seal, to be transmitted thither, and deposited in the exchequer at Dublin. And soon after, in an Irish parliament, by general consent, and at the instance of the Irish, he ordained, that the English laws and customs should thenceforth be observed in Ireland ; and in order to it, he sent his judges thither, and erected courts of judicature at Dublin (a).

But notwithstanding these precautions of king John, yet for that the Brehon law (b), and other Irish customs, gave more of power to the great men, and yet did not restrain the common people to so strict and regular a discipline, as the laws of England did ; therefore, the very English themselves, became corrupted by them ; and the English laws soon became of little use or esteem, and were looked upon by the Irish and the degenerate English, as a yoke of bondage : so that king Henry III. was oftentimes

(a) Some have entertained an opinion that the laws of England were early introduced into Ireland by Henry II. long prior to the charter of John. Matt. Par. ad ann. 1172, vit. Hen. II. — Molyn. Case of Irel. 24. — War. Antiq. Irel. — Lec. Hist. Irel. 76. — Faugh. 293. — 4 Inst. 349. In the Harleian Collection of MSS. in the British Museum, is a very ancient manuscript of two remarkable pieces of the old municipal laws of Ireland, with commentaries and glosses. The text in this manuscript is so very ancient, as to be coeval with the times the pieces relate to : the one being part of the Bretonian, or *Judicia Celestia*, with the trial of Kuna, brother of Legarius, chief king of Ireland,

for the murder of Orane, chariot-driver to St. Patrick, before Dubhthac, the chief filodha, or king's bard ; who on that occasion acted as sole brehon or judge, with the sentence passed thereon in the year 430 : the other, the great sanction or constitution of *Ame*, made in favour of christianity in Ireland, anno 439, by three kings, three bishops, and three sages. Astley's pref. to the index to that collection.

(b) A law, or custom, by which the Irish were governed at the time of the conquest by Henry II. — so stiled from the Irish name of judges, who were called brehons. Vide 4 Inst. 358. — Edm. Spenser's State of Ireland, p. 1513. edit. Hughes.

necessitated to revive them, and by several successive writs to enjoin the observation of them (*a*); and in the eleventh year of his reign he sent the following writ, viz.

“ Henrici, rex, &c. Baronibus militibus & aliis liberi tenenti—
 “ bus Lageniæ, salutem, &c. Satis ut credimus vestra audivi
 “ discretio, quod cum bonæ memoriæ Johannes, quondam rex
 “ Angliæ pater noster venit in Hiberniam, ipse duxit secum viros
 “ discretos & legis peritos, quorum communi consilio, & ad instaur-
 “ tiam Hibernensium statuit & præcepit leges Anglicanas teneri
 “ in Hibernia, ita quod leges easdem in scriptis readactas reliquit
 “ sub sigillo suo ad scaccar. Dublin. Cum igitur consuetudo &
 “ lex Angliæ fuerit, quod si aliquis desponsaverit aliquam mu-
 “ lierem, sive viduam sive aliam hæreditatem habentem, & ipse
 “ postmodum ex ea prolem suscitaverit, cujus clamor auditus
 “ fuerit infra quatuor parietes, idem vir si supervixerit ipsam
 “ uxorem suam, habebit tota vita sua custodiam hæreditatis
 “ uxoris suæ, licet ea forte habuerit hæredem de primo viro suo
 “ qui fuerit plenæ ætatis: Vobis mandamus injungentes quatenus
 “ in loquela quæ est in curia Willi. Com. Maresc. inter Mauri-
 “ tium Fitz Gerald petent. & Galfridum de Marisco justiciarium
 “ nostrum Hiberniæ tenentum, vel in alia loquela quæ fuerit in
 “ casu prædicto nullo modo justitiâ in contrar’ facere præ-
 “ sumatis.

“ Teste Rege apud. Westm. 10 Decemb.

“ Anno 11^o regni nostri (*b*).”

(*a*) Henry III. (A. R. 30. 1 Rym. Foed. 442.) and Edward I. (A. R. 5. 3 Pryn. Rec. 1218.) were necessitated to renew the injunction of John; notwithstanding which, the Irish still adhered to the brehon law. At a subsequent period, however, i. e. 40 Edw. III. the brehon law was abolished, under the idea of its being “a lewd custom, crept in of later times.”—Spenser, speaking of this law, describes it to have been “a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity, in determining the right between party and party; but in many things, repugnant quite both to God’s law and man’s.” Though this abolition of the brehon law was in form effected, by means of a statute made at Kil-kenny, whilst the duke of Clarence was

lord deputy, yet it is most certain, that the act was never carried into execution beyond the English pale; any more than another made in the time of Henry VII. by which the use of the Irish language was forbidden, under certain penalties. The first statute which thoroughly established the dependence of the Irish, was the famous law of sir Edward Poynings, who was lord deputy of Ireland in the reign of Henry VII. Bar. on Stat. 143. So much of the Irish statutes of 40 Edw. III. as relates to the abolition of the brehon law, is in Dav. on Ireland, p. 28. of the folio edition. See also Harris’s edition of Ware’s Antiq. of Ireland, 69.

(*b*) Glan. 1. 7. c. 18. p. 60. Rot. Claus. 11 Hen. III. 7 Co. 22. b. Calvin’s case. Co. Lit. 141. b. Wright’s Ten. 192.

And note, in the same year, another writ was sent to the lord justice, commanding him to aid the episcopal excommunications in Ireland, with the secular arm, as in England was used.

About this time, Hubert de Burgo, the chief justice of England, and earl of Kent, was made earl of Connaught, and lord justice of Ireland during life; and because he could not personally attend, he on March the 10th 1227 appointed Richard de Burgo to be his deputy, or lord justice, to whom the king sent the following writ.

“ Rex dilecto & fideli suo Richardo de Burgo justiciario suo
 “ Hiberniæ salutem. Mandamus vobis firmiter præcipientes,
 “ quatenus certo die & loco faciatis venire coram vobis, archiepis-
 “ copos, episcopos, abbates, priores, comites & barones, milites &
 “ libere tenentes & ballivos singulorum comitatum, & coram eis
 “ publice legi faciatis chartam domini Johannis regis patris nostri
 “ cui sigillum suum appensum est, quam fieri fecit, & jurari a
 “ magnatibus Hiberniæ de legibus & consuetudinibus Anglorum
 “ observandis in Hibernia; & præcipiatis eis ex parte nostra,
 “ quod leges illas & consuetudines in charta prædicta contentas
 “ de cetero firmiter teneant & observent. Et hoc idem per singu-
 “ los comitatus Hiberniæ clamari faciatis, & teneri prohibentes
 “ firmiter ex parte nostra & forisfacturam nostram, ne quis contra
 “ hoc mandatum nostrum venire præsumat. Eo excepto quod
 “ nec de morte nec de catallis Hibernensium occisorum nihil
 “ statuatur ex parte nostra citra quindecim dies a Sancti Michaelis
 “ anno regni nostri 12°. Super quo respectum dedimus magnat.
 “ nostri de Hib. usque ad Terminum prædict’ Teste meipso apud
 “ Westm. 8° die Maii, anno regni nostri 12°.”

And about the 20th year of Henry III. several writs were sent into Ireland, especially directing several statutes which had been made in England, to be put in use, and to be observed in Ireland; as the statute of Merton, in the case of bastardy, &c.

But yet it seems, by the frequent grants that were made afterwards to particular native Irish men, *quod legibus utantur Anglicanis*, that the native Irish had not the full privilege of the English laws, in relation at least to the liberties of English men, till about the third of Edward III. Vide Rot. Claus. 2 E. 3. memb. 17.

As the common law of England was thus by king John and Henry III. introduced into Ireland, so in the tenth of Henry VII. ALL THE PRECEDENT STATUTES OF ENGLAND WERE THERE

SETTLED BY THE PARLIAMENT OF IRELAND. 'Tis true, many ancient Irish customs continued in Ireland, and do continue there, even unto this day. But such as are contrary to the laws of England are disallowed. Vide Davis's Reports, 28. b. the Case of Tanistry (A).

(A) Blackstone observes, that though the immemorial customs, or common law of England were made the rule of justice in Ireland, yet no acts of the English parliament, since the 12th of king John, extended into that kingdom, unless specially named, or included under general words; such as "within any of the king's dominions." This is particularly expressed, and the reason given in the Year-Books*: "A tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament:" and again, "Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send knights to our parliament: but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigny and Guienne, while they continued under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power, sees it necessary to extend its care, to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but *then* they are bound by its laws†.

Ireland, before the English conquest, though never governed by a despotic power, had no parliament. How far the English parliament itself was at that time modelled according to the present form, is a point much disputed by antiquaries. But we have all the reasons in the world to be assured, that a form of parliament, such as England then enjoyed, she instantly communicated to Ireland; and we are equally sure that almost every successive improvement in constitutional liberty, as fast as it was made here, was transmitted there. But this benefit of English laws and liberties, was not at first extended to *all* Ireland. English authority and English liberties, had exactly the same boundaries. Sir John Davis shows, beyond a doubt, that the refusal of a general communication of these rights, was the true cause why Ireland was five hundred years in subduing. Nothing could make that country English, in civility and allegiance, but our laws and form of legislation. It was not English arms, but the English constitution, that conquered Ireland. From that time, Ireland had a general parliament, as before she had a partial one‡.

Henry the Seventh, having sufficiently silenced all opposition in Ireland, took every politic advantage of the precarious situation to which the Irish were reduced; to prevent them, therefore, from passing laws *rege inconsulto*, and to make such an alteration in their legislature, as would throw the principal weight into the hands of him and his successors, he was particularly anxious

* 40 Hen. VI. 8. 2 Ric. III. 12.

† Edm. Burke.

‡ Year-book 1 Hen. VII. 3. 7 Rep: 22. Calvin's case. Blac. Com, 1 v. 101.

to effect the passing of those laws, which have ever since been known by the name of Poynings' law.

The original method of passing statutes in Ireland, was nearly the same as in England; the chief governor holding parliaments annually, or, as Blackstone conceives, at his pleasure, which enacted such laws as they thought proper*. But an ill use being made of this liberty, a set of statutes was there enacted, in the 10 Henry VII. (sir Edward Poynings being then lord deputy, whence they are called Poynings' law) one of which†, in order to restrain the power, as well of the deputy as of the Irish parliament, provides, first, that before any parliament be summoned or holden, the chief governor and council of Ireland, shall certify to the king under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed herein. Secondly, that after the king, in his council of England, shall have considered, approved, or altered the said acts, or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, THEN the same shall be summoned and holden; and therein the said acts so certified, and no other, shall be proposed, received, or rejected‡. But as this precluded any laws from being proposed, but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering any law. It was now clear, that neither the lords nor the commons in Ireland, had a right to frame or to propose bills to the crown, but they must first be framed in the privy council of Ireland; be afterwards consented to, or altered by the king and council in England; and then, appearing in the form of bills, be refused or accepted *in toto* by the lords and commons of Ireland. Mr. Justice Blackstone says, that the usage, at the time he wrote, was, that bills were often framed in either house, under the denomination "of heads for a bill or bills;" and in that shape were offered to the consideration of the lord-lieutenant and privy-council; who, upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission to England; and with regard to Poynings' law in particular, it cannot be repealed or suspended, unless the bill for that purpose, before it be certified to England, be approved by both the houses§.

It is true, that as well the lords, as the commons, in Ireland, attempted, and should seem to have gained, an approach towards their ancient right of beginning bills. This had been done, not in that name, but under the nomination of "HEADS of bills," to be transmitted by the council; who, as they framed the acts, had assumed the power of modelling them also. Thus restrained, Ireland exhibited a legislature of peculiar complication. First, the privy council of Ireland, who, though they might receive the hint from the lords or the commons, framed the bill; next, the king and council of England, who,

* Irish Stat. 11 Eliz. st. 3. c. 8.

† 4 Inst. 353.

‡ Cap. 4. expounded by 3 & 4 Ph. & M. c. 4.

§ Irish Stat. 11 Eliz. st. 3. c. 38.

having the power of alteration, really made it a bill, *UNALTERABLE*, by sending it under the great seal of England;—then, the two houses of lords and commons in Ireland, must have agreed in, or rejected, the whole:—if it passed all these, it was presented to the king for his assent, which, as it was before obtained, could only, in that stage of the process, be nominal.

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law; and the measure of justice in both kingdoms becoming thereby no longer uniform, therefore it was enacted, by another of Poynings' laws*, that all acts of parliament, before made in England, should be of force within the realm of Ireland†. But, by the same rule, that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it followed that no acts of the English parliament made since the 10th Henry VII. did bind the people of Ireland, unless specially named or included under general words‡. And on the other hand, it was equally clear, that where Ireland was particularly named, or included under general words, they were bound by such acts of parliament. For that follows from the very nature and constitution of a dependent state; dependence being very little else, but an obligation to conform to the will or law of that superior person, or state, upon which the inferior depends§.

But this state of dependence not being acknowledged by the Irish nation, it was thought necessary to declare by statute (6 Geo. I. c. 5.) that the kingdom of Ireland ought to be subordinate to, and dependant upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, had power to make laws to bind the People of Ireland.

Thus (continues Blackstone) we see how extensively the laws of Ireland, communicate with those of England; and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of error (in the nature of an appeal) lying from the king's-bench in Ireland, to the king's-bench in England||, as the appeal from the chancery in Ireland, lies immediately to the house of lords:—it being expressly declared, by the same statute 6 Geo. I. c. 5. that the peers of Ireland, have no jurisdiction, to affirm or reverse any judgment or decree whatsoever. The propriety, and even necessity in all inferior dominions, of this constitution, "that though justice be in general administered by courts of "their own, yet that the appeal in the last resort, ought to be to the courts of "the superior state," is founded upon these two reasons: First, because otherwise the law appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. Secondly, because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England¶.

Whatever praise the motives which produced the 6 Geo. I. might heretofore

* Cap. 22.

† 4 Inst. 351.

‡ 12 Rep. 112.

§ Puff. L. of N. l. 8. c. 6. s. 24—and l. 7. c. 7. s. 3, 4.—Grot. l. 3. c. 8. and 15.

|| This was law in the time of Hen. VIII.; as appears by the ancient book, entitled, *Diversity of Courts*, c. *bank le roy*.

¶ Black. Com. 1 v. 102. Sulliv. sect. 209. 218. 221. Vaugh. 402.

deserve, they have in more liberal and enlightened times, been thoroughly investigated, and in the end, completely exploded, on the sound principles of policy and justice. On the 17th of May 1782, the situation of Ireland was taken into consideration by both houses of parliament, in consequence of addresses from the parliament of that kingdom. In the course of the debate (in the house of Commons of Great Britain,) it was stated and admitted, that the act of the 6th of George the First, which had never been acknowledged by the legislature of Ireland, was the first object sought to be repealed by the parliament there; and that not only the parliament, but the united voice of the whole country had declared its illegality. The matter stood on so plain a position, that the argument came home to the fact immediately, and proved the impolicy of one legislature making laws to bind another. Ireland had its representatives as well as England; it was under the same constitution, and therefore entitled to the same internal immunities.

The great points to which the claims of the Irish parliament were directed, appeared to be—the repeal of the 6th of George I.—the restoration of the appellate jurisdiction—the modification of the law of Poynings, and the repeal of the perpetuating clause in the mutiny bill.

And first, as to the 6th of George I. it was said to be downright tyranny, to make laws for the internal government of people who were not represented among those by whom such laws were made.—This was an opinion so founded in justice, that in no situation should it ever be departed from. The distinction between internal and external legislation was manifest;—and though it would be tyranny to attempt to enforce the former, in countries not represented in the British parliament, yet the latter was in reason and policy, annexed to the British legislature; and which right of supremacy, would never have given umbrage to any part of the empire, if it had been used solely for the general good; but when made an instrument of oppression, it was not wonderful, that it should excite discontent, and opposition. When local legislatures were established in different parts of the empire, it was clearly for the purpose of answering municipal ends; and the great superintending power of the state ought not to be called into action, but in aid of the local legislature, and for the good of the empire at large. But when ministers, as heretofore, judging by what they had, of what they might have, carried the principle of external, to internal legislation, and attempted to bind the internal government of its colonies, by acts, in the passing of which the colonies had no voice,—that power, which on proper occasions would have been cheerfully obeyed, created animosity and hatred, and had produced the dismemberment of an empire, which if properly exerted, it would have served to unite, and bind in the firmest manner. That Ireland had the same reason to spurn at this power of external legislation, because it had been employed only for the purpose of distressing her. Had Ireland never been made to feel that power, she never would have complained of it; and the best and most effectual way to have kept it alive, would have been, not to have made use of it. Ireland would then have suffered it to exist in the statute book; and never would have called for the renunciation of it. But it had been employed against Ireland, as an instrument of oppression, to establish an impolitic monopoly in trade; to enrich one country at the expense of the other. When the Irish first complained of the monopoly*, and

* About the year 1778.

asked as a favour, what they might have claimed as a right, they were opposed; their demands, which were no less modest than just, were disregarded. It was not local or commercial jealousy, so common in all countries, which had operated to the disappointment of the Irish, at that time. Their demands were not only rejected, but the then first confidential servant of the crown, came down to vote against them. The influence of the minister was exerted, and the rights and distresses of Ireland were consigned to oblivion. Thus the supreme power of the British parliament, was employed to gratify a few, and to distress a whole kingdom.—What was the consequence? The Irish finding they had nothing to expect from the justice of their demands, found resources in themselves. They armed. Their parliament spoke out. The very next year, the very same minister who before had put a negative on all their expectations, came down to the house, and making *amende honorable* for his past conduct, gave to the demands of an armed people, infinitely more than he had refused, to the modest applications of an unarmed humble nation. Such had been the conduct of the then minister and his colleagues; and this was the lesson the Irish had been taught:—"If you want any thing, seek not for it "unarmed and humbly; but take up arms, speak manfully and boldly, and "you will obtain more than you at first might have ventured to expect." Such was the consequence of the ill use made of the superintending power of the British parliament; which was perverted from its true use; and instead of being the means of rendering the different parts of the empire happy and connected, had made millions of subjects rise up against a power, which they felt only as a scourge.

That it was not the intention of parliament to pursue the footsteps of its predecessors; and therefore it would agree to the demands of the Irish relative to the 6th of George I. because it believed them to be founded in justice. He must be a shallow politician who would enforce obedience to laws, which were odious to those whom they were made to bind. That it was better to see Ireland totally separated from the crown of England, than kept in obedience only by force. Unwilling subjects, were little better than enemies. It would be better not to have subjects at all, than to have such, as would be continually on the watch, to seize the opportunity of making themselves free. That if this country should attempt to coerce Ireland, and succeed in the attempt, the consequence would be, that, at the breaking out of every war with any foreign power, the first step must be to send troops over to secure Ireland, instead of calling upon her to give a willing support to the common cause.—Having said thus much of the repeal of the 6th of George I. which it was intended to agree to, in the most unequivocal manner, the subject next touched upon was the *Appellat Jurisdiction*. Upon this question there was no difficulty; for when the great question of legislation was given up, it could not be of any consequence to maintain to this country the jurisdiction in appeals. But even if that was a desirable object, or likely to strengthen the tie between the two countries, it must be given up, for the Irish insisted upon it; and there was a particular reason for complying with their desires on that head. The decrees or judgments of our courts of law here, in matters of appeal, were to be carried into execution—where? In Ireland. By whom? By the people of Ireland. But as the people of Ireland had one and all declared, that they would not execute the order of any English tribunal, it would be nugatory and absurd to maintain

the appellat jurisdiction to Great Britain; consequently it would be better to give it up with a good grace, than to keep it as a bone of contention between the two countries. As to the *modification of Poynings' law*, it was admitted, that by that law, a strange alteration had been made in the form of the constitution of Ireland, by making the privy council of that kingdom, a branch of the legislature, and those who were acquainted with the nature of the interference of that privy council, knew it was of the greatest detriment to the state. It not only sometimes suppressed bills, which had passed the houses of lords and commons *nemine dissentiente*; but, such was the nature of it, that bills were sometimes passed according to *form* indeed, but in *fact*, *nemine assentiente*; when it was contrary to the intention of any man that such bills should pass.—They were nevertheless supported by all, in confidence that, in the privy council, they would be thrown out. This kind of conduct was merely to gain popularity. Men who did not wish to oppose popular opinions, which they did not approve, nevertheless unanimously gave way to those opinions, merely because they knew they would be rejected in the privy council.—And the interference of that body, and their power to stop bills in their progress from parliament to the king, was improper. No objection, therefore, could arise, to advise his majesty to consent to the modification which they required, of that law, from which the privy council derived that power. But the jealousies of the Irish went farther; they were jealous of the interference of the English privy council; and it was admitted that the alterations which had sometimes been made by it in Irish bills, had given but too just cause for jealousy. It was generally understood in Ireland, that Irish bills were frequently altered in England, with very little consideration, and sometimes by a single person (the attorney general); which single person, the Irish imagined, made alterations, without giving that attention to the bills, which the subject and importance of them required. Whether those opinions were, in general, well founded could not be said;—but this was evident, that like the 6th of George I. the power might still have remained, if an improper use had not been made of it. It had been grossly abused, in one instance, in particular. A bill had been sent over to England, wisely and justly granting indulgencies to the Catholics; in that same bill there was a clause, in favour of the Dissenters, for repealing the sacramental test; the clause was struck out, contrary to sound policy; as the alteration tended to make an improper discrimination between two descriptions of men, and did not tend to the union of the people. By such conduct, the Irish were driven to pronounce the interference of the English privy council, in altering their bills, a grievance;—though the power would never have been complained of, if it had never been abused.

As to the *mutiny bill*, it was not matter of surprise, that the Irish should object to a clause which gave *perpetual* establishment to a military force in their country. So hostile was such a clause to the constitution of England, as well as of Ireland, that if the Irish had never mentioned that law among their grievances, it would have been the duty of every Englishman to have recommended the repeal of it. The Irish must naturally feel that jealousy for their constitution, which the English feel for that of England,—and which they express by passing a mutiny law, only for one year. The perpetuating clause had this effect also, that it rendered the interference of the English privy council more odious.

But as it was possible, that if nothing more was to be done than what had been stated, Ireland might think of fresh grievances, and rise yearly in her demands, it was proper something should be done, towards establishing on a solid basis, the future connection of the two kingdoms. That, however, was not to be proposed in parliament; it would be the duty of the crown to look to that; the business might be first begun by his majesty's servants in Ireland; and if afterwards it should be necessary to enter into a treaty, commissioners might be sent from the British parliament, or from the crown, to enter upon it, and bring the negotiation to a happy issue.

It was then moved, "that the 6th of George I. be repealed."

Upon which it was remarked, that the mere repeal of the act would not satisfy Ireland, because the repeal would leave the question just as it was before, and England would still have the same right which she before had, unless some counter-declaratory clause, was inserted in the repealing act. The latter part of the 6th of George the First, went only to appeals to the lords: but though that bill should be repealed, still there would remain an appeal to the courts of law here, by writ of error, to which the Irish would not submit; and therefore the whole ground of appeal should be done away.

The claims of the Irish, it was urged, were not novel; they were as old as Henry II. who had given them the laws and constitution of England; and of course, a parliament. The Great Charter was granted to them by Henry III. and they had a free and independent legislature, till the year 1719, when the lords of England thought proper to resolve, that a cause which had been tried in appeal by the lords of Ireland, had been *coram non judice*; when, and not before, did England think of asserting by law her supremacy over Ireland; though the latter, till that period, enjoyed the appellat jurisdiction.

The question was put, and carried *nemine contradicente*.

It was then moved, for leave to bring in a bill to repeal the 6th of Geo. I.—which also passed *nem. con.*; after which it was moved, that "an address be presented to his Majesty, praying that he will be graciously pleased to take such steps as shall tend to render the connection between the two kingdoms, solid and permanent."—This also passed unanimously.

It was next moved, that the interests of the two kingdoms are inseparable, "and that their connexion ought to be founded on a solid and permanent basis."—This resolution passed also *nem. con.* and the chairman having left the chair, and the house being resumed, he reported the resolutions, which were UNANIMOUSLY agreed to by the house.

Similar motions were made on the same day, in the house of lords, which passed in the affirmative, with only one dissentient. In consequence of the resolutions, a bill was immediately brought in and passed, for the purpose of forwarding the wise and generous views of the British nation towards a brave, loyal, and oppressed people. By the 22 Geo. III. c. 53. the 6 Geo. I. c. 5. was repealed; but doubts being entertained, whether the repealing act was sufficiently comprehensive, it was afterwards, by 23 Geo. III. c. 28. enacted, that "the right claimed by the people of Ireland, to be bound only by laws enacted by his majesty and the parliament of that kingdom, in all cases whatever, and to have all actions and suits, which may be instituted in that kingdom, decided in his majesty's courts therein, finally and without appeal from thence, shall be esta-

blished and ascertained for ever, and shall, at no time hereafter, be questioned or questionable. That no writ of error or appeal shall be received or adjudged, or any other proceeding be had, by or in any of his majesty's courts in this kingdom, in any action or suit instituted in any of his majesty's courts in the kingdom of Ireland; and that all such writs, appeals, or proceedings, shall be void *."

Notwithstanding this dissolution, as it were, of the Irish constitution, the people of both countries, were anxious that they might still be connected by such political principles, as should make their interests, their privileges, and their power one, and that in a more constitutional manner, than they had ever been before; by uniting them, not only under the same crown, but under the same legislature.

This, though acknowledged by both houses of parliament, to be of indispensable necessity, was nevertheless postponed, *sine die*. Lord North, however, in 1783, in proposing a new act relative to the postage of letters, acknowledged "that Great Britain and Ireland had become to each other, in point of political power, as foreign nations." In truth the relative situations of the two islands was then not only novel, but alarming;—liable to be separated by a thousand accidents, which no human wisdom could prevent.

The three great objects to be accomplished for the formation of a constitutional connection between two nations, are, equality of interests, equality of privileges, and an unity of power. The two first were, already in a great measure provided for as to Ireland, and very little remained indeed, which could be urged as complaint against the British government. But the unity of power, or unity of defence, between Great Britain and Ireland remained unsettled 'till 1799, when on the 22d of January, a message on that subject, was received from his majesty, by both houses of parliament. After adverting to the unremitting industry, with which our enemies persevered in their avowed design of effecting the separation of Ireland from this kingdom, his majesty recommended the parliament to consider, of the most effectual means, of finally defeating that design, by disposing the parliaments of both kingdoms, to provide, in the manner which they should judge the most expedient, for settling such a complete and final adjustment, as might best tend to improve and perpetuate a connexion, essential for their common security; and consolidate the strength, power, and resources of the British empire. On the following day, when this message was taken into consideration, in the commons, Mr. Secretary Dundas, having laid on the table several papers relative to the proceedings of certain societies in Ireland, and the rebellion in that country, moved an address to his majesty, the substance of which was "That the house would proceed, with all due dispatch, to the consideration of the several interests recommended in his majesty's message."

In discussing this important motion, it was urged that the evils with which Ireland was afflicted, lay deep in the situation of the country. They were to be attributed to the manners of its inhabitants, to the state of society, to the habits of the people at large, to the unequal distribution of property, to the want of civilized intercourse, to the jarring discord of party, and above all, to the prejudices of religious sects. This deplorable situation of the country was not

* See Mill. View of the Eng. Governm. 4 vol. oct. and 39 and 40 Geo. 3. c. 67. art. 8. post 253.

to be remedied, by any act of the Irish parliament, but by gradual, sober, dispassionate improvement and civilization ; by the circulation of capital ; by the social intercourse naturally flowing from trade and commerce ; by the diffusion of social habits ; by the dissemination of liberal sentiment ; by removing party distractions ; by suppressing factious associations ; by allaying hereditary feuds between two nations subsisting in the same island, and by the extinction of religious prejudices. For such remedies, provisions could only be found in an independent legislature removed from the immediate seat of the complicated disease ; which should not be partial to either party, but the fair arbiter and kind parent of both ; which should not be liable to local influence, nor subject to popular incitement, and which should be fully competent to stand against the lawless inroads of innovation and anarchy.

That with respect to the confinement of property in a few hands, the extraordinary disparity of rank, and the scanty means of social improvement, all producing in a proportionate degree, misery in one extreme and oppression in the other, how could these grievances be remedied, but by a closer connexion with Great Britain ? The situation of Ireland must also be remedied by an influx of capital, and the circulation of wealth : and whence were those necessary ingredients to be supplied, but by assimilating it with Great Britain ; by blending her with this country ; to partake of every solid benefit, of every eminent advantage that could result from such incorporation ?

That when the act was passed, which gave independence to Ireland, it was accompanied by a resolution, stating, that it was the opinion of the house, that the connexion between both kingdoms should be consolidated by future measures or regulations, founded on the basis of mutual consent. No final settlement therefore, in 1782, had, as was alleged, been made with Ireland. And nothing had since been attempted, to provide for that defective settlement, but the partial and inadequate measure of the Irish propositions, which were defeated by the persons who framed the resolution, but who found no substitute in their room. Was there no probable case in which the legislatures of both kingdoms might differ ? One had actually arisen, and that within the short space of sixteen years—that of the regency. The difference of principle was evident, for the Irish parliament decided upon one principle, and the British parliament upon another. They both led to the appointment of the same person, but that was accidental, for that person must have governed the two kingdoms upon different principles. The office of regent, on grounds equally justifiable, might have been vested in two distinct persons. Could any man, with so instructive an example, talk with sincerity of a final adjustment ? Would any one pretend to maintain, that when the habit of discussing the foreign relations of the empire should take place, the parliament of Ireland might not, as it might naturally think itself entitled to do, proceed to inquire into treaties and alliances ? And on a supposed difference of local interest, was it impossible that the parliament of Ireland, might take one step in giving advice to the sovereign, and the parliament of Great Britain another ?

On Thursday January 31st, 1799, the order of the day for taking his majesty's message, relative to an union with Ireland into consideration, being read, the following resolutions were moved : viz.

“ First, That in order to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of

the British empire, it will be advisable to concur in such measures as may best tend to unite the two kingdoms of Great Britain and Ireland into one kingdom, in such manner, and on such terms and conditions, as may be established by acts of the respective parliaments of his majesty's said kingdoms.

"Second, That it appears that it would be fit to propose, as the first article to serve as a basis of the said Union, that the said kingdoms of Great Britain and Ireland, shall upon a day to be agreed upon, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

"Third, That for the same purpose, it would be fit to propose, that the accession to the monarchy, and the imperial crown of the said united kingdoms, shall continue limited and settled in the same manner as the imperial crown of the said kingdoms of Great Britain and Ireland, now stands limited and settled, according to the existing laws, and to the terms of the union between England and Scotland.

"Fourth, That for the same purpose, it would be fit to propose, that the said united kingdom be represented in one and the same parliament, to be styled the Parliament of the United Kingdom of Great Britain and Ireland, and that such a number of lords spiritual and temporal, and such a number of members of the house of commons, as shall be hereafter agreed upon by acts of the respective parliaments as aforesaid, shall sit and vote in the said parliament, on the part of Ireland, and shall be summoned, chosen, and returned, in such manner as shall be fixed by an act of the parliament of Ireland, previous to the said union; and that every member hereafter to sit and vote in the said parliament of the united kingdom shall, until the said parliament shall otherwise provide, take and subscribe the same oaths, and make the same declarations, as are by law required to be taken, subscribed, and made by the members of the parliaments of Great Britain and Ireland.

"Fifth, That for the same purpose it appears it would be fit to propose, that the churches of England and Ireland, and the doctrine, worship, discipline and government thereof, shall be preserved as now by law established.

"Sixth, That for the same purpose, it would be fit to propose, that his majesty's subjects in Ireland, shall at all times hereafter, be entitled to the same privileges, and be on the same footing in respect of trade and navigation, in all ports and places belonging to Great Britain, and in all cases with respect to which treaties shall be made by his majesty, his heirs or successors, with any foreign power, as his majesty's subjects in Great Britain; and that no duty shall be imposed on the import or export between Great Britain and Ireland, of any articles now duty free; and that on other articles, there shall be established, for a time to be limited, such a moderate rate of equal duties, as shall, previous to the union, be agreed upon and approved by the respective parliaments, subject, after the expiration of such limited time, to be diminished equally with respect to both kingdoms, but in no case to be increased; and that all articles which may at any time hereafter, be imported into Great Britain from foreign parts, shall be importable through either kingdom into the other, subject to the like duties and regulations, as if the same were imported directly from foreign parts; that where any articles, the growth, produce, or manufacture of either kingdom, are subject to any internal duty in one kingdom, such countervailing duties, (over and above any duties on import to be fixed as aforesaid) shall be imposed, as shall be necessary to prevent any

inequality in that respect, and that all other matters of trade and commerce, other than the foregoing, and than such others as may before the union be specially agreed upon, for the due encouragement of the agriculture and manufactures of the respective kingdoms, shall remain to be regulated from time to time by the united parliament.

" Seventh, That for the like purpose, it would be fit to propose, that the charge arising from the payment of the interest or sinking fund, for the reduction of the principal of the debt incurred in either kingdom before the union, shall continue to be separately defrayed by Great Britain and Ireland respectively. That, for a number of years, to be limited, the future ordinary expences of the united kingdom, in peace or war, shall be defrayed by Great Britain and Ireland jointly, according to such proportions as shall be established by the respective parliaments previous to the union; and that after the expiration of the time to be so limited, the proportions shall not be liable, except according to such rates and principles, as shall be in like manner agreed upon, previous to the union.

" Eighth, That for the like purpose it would be fit to propose, that all laws in force at the time of the union, and that all the courts of civil and ecclesiastical jurisdiction, within the respective kingdoms, shall remain as now by law established within the same, subject only to such alterations or regulations from time to time, as circumstances may appear to the parliament of the united kingdom to require."

In debating these resolutions, it was assumed as a fact, that there existed in Ireland, at this time, a spirit of dissension and clamour, of treachery and treason, which menaced the overthrow of the present government. Conspiracies were so widely extended, their influence was so deeply infused into the minds of the people of Ireland, and the connexion between the two countries thereby so much endangered, that without the immediate and active interference of government, the result might have been a total separation of Ireland from this kingdom. It was the duty of his majesty's ministers, viewing Ireland in this perilous situation, to extricate her from the intrigues of the common enemy, by preserving and improving the connexion which had so long, and so happily subsisted between that country and Great Britain. A more appropriate remedy for the disease, which poisoned the peace and happiness of Ireland, could not be imagined than the incorporating union of the legislatures of the two kingdoms. The Protestants would lay aside their jealousies and distrust, and the Catholics would be confident that their cause would be candidly and impartially considered by a united parliament; the great body of which, would be relieved from apprehensions, jealousies, and inveterate animosities, interwoven into the frame and constitution of the separate parliament of Ireland. An incorporated parliament, partly English, partly Scotch, and partly Irish, would be better calculated for managing the affairs of the British empire, than separate parliaments in England, Scotland, and Ireland. The powers of a parliament so constituted, would be more extensive and effectual, than when acting separately in different places. It should be recollected, that the Irish parliament, with all its boasted independency, could not give vigour or effect to its acts, till approved by the third estate, whose residence was in England. The controlling power was properly vested in the sovereign of this country, who was also the sovereign of Scotland and Ireland; therefore the

parliament of Ireland was not entirely independent. In all cases of peace or war, it must implicitly follow the parliament of Great Britain. The parliament constituted by the union, had not deprived Scotland of any of the privileges, enjoyed previously to its incorporation with England. That union had increased the privileges of the Scotch members; for, instead of confining their deliberations to the affairs of Scotland, they were empowered to take part in discussions respecting the affairs, not only of England, but of the whole British empire; and so far as related to the third estate, had even an interference with the affairs of Ireland. The parliament of Ireland, incorporated on the same principles, would have the same privileges. It was a mis-statement of facts, to talk of destroying the parliament of Ireland; for an union, would place the Irish members in the same situation, as the members of the British parliament. In considering the present question, it was impossible not to turn our eyes to the state of Scotland, before and since the union, and to contemplate the advantages which had resulted from it, to that part of the united kingdom. The increased improvements, and the increase of trade, were not confined to any particular part of Scotland. They were experienced in every corner of it; and there was not now an inhabitant of any spot in all Scotland, who had not cause to rejoice at that event.

A question had been triumphantly asked, "Why not give all those advantages to Ireland, without an union?" Without an incorporating union they would be of no avail; for the strength and resources of both countries must be consolidated, in order to enable Ireland to reap the full advantage from such concessions. It is from confidence in the strength of government alone, that a communication of capital and other advantages can arise.

That in comparing the sacrifices of Scotland to the union, with those of Ireland, it should be recollected, that Ireland had not for many centuries, been free, or independent of England; but that Scotland never was completely subdued or under the control of England; that Scotland gave up, what Ireland could not give up, an independent and separate crown. The Scots undoubtedly surrendered those honours at the time with reluctance, and evinced the greatest hostility to the union, until experience had made them acquainted with its blessings. The vast unpopularity of the duke of Queensberry and other commissioners, who favoured that union, while the zeal and activity of the duke of Hamilton and lord Belhaven, were the theme of every tongue, were well known. The duke of Queensberry, who took the most active part in carrying the union into effect, and was her majesty's commissioner for the purpose, narrowly escaped, in several instances, with his life. But the union soon became so popular, that the pretender, having pledged himself to a repeal of the act of union, excited such a fermentation against him, that he was obliged to expunge this promise from his manifesto. This change of sentiment happened in the year 1716, eight years after the union.

With regard to the final adjustment of the year 1782, it was a misapplication of terms, to call it final. It was a mere temporary expedient, to serve the purposes of the moment.

The report of the committee was brought up on the 14th of February, when all the resolutions, with some amendments, were agreed to, and sent up to the house of peers. On the 18th of February a message, from the commons, was

delivered by earl Temple, to the lords, requesting a conference respecting the means of perpetuating and improving the connexion between the two countries. The address of their lordships, on the subject of the union, was taken into consideration on the 22d of April; and a motion made in the commons, "that the house do concur in the said address," which was agreed to. A message was then sent to the house of peers, informing their lordships, that the commons had agreed to the address, and filled up the blank with the words "and commons."

The question on the address was carried *nem. con.* in the house of lords.

The resolutions of the British legislature, having been remitted to Ireland, with some alterations, for the reconsideration of that country, in May 1799, they became the subject of parliamentary discussion there. The populace of Dublin, and many other towns, manifested an aversion to the union, in every mode, in which they could shew it, short of an armed opposition.

The Irish parliament, having assembled on the 15th of January 1800, it was moved in the house of commons, that they should, in their address to the viceroy, declare their *disapprobation* of an incorporating union. But the motion was negatived by 138 voices against 96. On the 5th of February, the whole plan of the union, was communicated to the house of lords, there, and eight articles (in substance the same, with those agreed on by the British parliament) were proposed, as the foundation on which it might be established, to the mutual benefit of both kingdoms. It was opposed, with great zeal and eloquence, by many of the peers, but was ultimately agreed to, by a great majority. A protest however against it was entered on the journals of the house. The most interesting debates on the subject, took place, as was to be expected, in the Irish house of commons; there, after many animated discussions, the question was carried by a great majority; and after some alterations of the articles, was approved by the same parliament, which the year before had rejected it. An address was voted by the two houses, on the 27th of March, informing his majesty of the result of their deliberations. In that address, "they considered the resolutions of the two houses of the British parliament, as wisely calculated to form the basis of an incorporation of Great Britain and Ireland, into one kingdom, under his majesty's auspicious government, by a complete and entire union of their legislature. They had adopted them, as their guide in the measures which they had pursued, and now felt it their duty to lay before his majesty, the resolutions to which they had agreed; and which, if they should be approved by the two houses of the parliament of Great Britain, they were ready to ratify, that the same might be established for ever, by the mutual consent of both parliaments." This address, with the resolutions of the lords and commons of Ireland, containing the terms proposed by them, for a union between the two kingdoms, was communicated by his majesty to the British parliament on the 2d of April, and became the chief subject of their deliberations, from the 21st of that month, to the 12th of May following.

The resolutions for the union having, after various amendments proposed and rejected, been agreed to, in the British house of commons, on the 5th of May a motion was made, "That an address should be presented to his majesty, to acquaint him, that they had proceeded to resume the consideration of the important subject of a legislative union between Great Britain and Ireland. That it was with unspeakable satisfaction, they had observed the conformity of the

resolutions of the lords and commons of Ireland, to those principles, which they had humbly submitted to his majesty in the last session of parliament, as calculated to form the basis of such a settlement. That, with a few alterations and additions which they had found it necessary to suggest, they considered these resolutions as fit to form the Articles of Union between Great Britain and Ireland. And if those alterations and additions should be approved of by the two houses of the parliament of Ireland, they were ready to confirm and ratify these articles, that the same might be concurring with his houses of parliament in Ireland, on the full conviction that, by incorporating the legislature, and consolidating the resources of the two kingdoms, they should increase the power and stability of the British empire, and, at the same time contribute in the most effectual manner, to the improvement of the commerce, and the preservation of the liberties of his subjects in Ireland." This address being voted, was communicated, in a conference, to the lords, (who, in a previous conference had made some small additions and amendments to the resolutions of the commons) on the 9th of May, and a joint address of both houses, on the subject of the union agreed to, was carried to his majesty: who, in his answer on the 12th of May, expressed the greatest satisfaction at their proceedings; and engaged, to communicate to his parliament of Ireland, the sentiments and declarations contained in the address.

The resolutions of the British parliament were without delay remitted to Ireland; and being approved by the Irish parliament, after a few slight alterations, were ratified by the parliaments of both kingdoms, and passed into a law, by the royal assent, on the 2d of July 1800.

By this act*, intituled, "An act for the Union of Great Britain and Ireland," reciting—

Whereas in pursuance of his majesty's most gracious recommendation to the two houses of parliament in Great Britain and Ireland respectively, to consider of such measures as might best tend to strengthen and consolidate the connexion between the two kingdoms, the two houses of the parliament of Great Britain and the two houses of the parliament of Ireland have severally agreed and resolved; that, in order to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of the British empire, it will be advisable to concur in such measures as may best tend to unite the two kingdoms of Great Britain and Ireland into one kingdom, in such manner, and on such terms and conditions, as may be established by the acts of the respective parliaments of Great Britain and Ireland:

And whereas, in furtherance of the said resolution, both houses of the said two parliaments respectively have likewise agreed upon certain Articles for effectuating and establishing the said purposes, in the tenour following:

ARTICLE FIRST.

That it be the first article of the Union of the kingdoms of Great Britain and Ireland, that the said kingdoms of Great Britain and Ireland shall, upon the first day of January which shall be in the year of our Lord one thousand eight hundred and one, and for ever after, be united into one kingdom, by the name

* 39 & 40 Geo. 3. c. 67.

of The United kingdom of Great Britain and Ireland ; and that the royal stile and titles appertaining to the imperial crown of the said united kingdom and its dependencies ; and also the ensigns, armorial flags and banners thereof, shall be such as his majesty, by his royal proclamation under the great seal of the united kingdom, shall be pleased to appoint.

ARTICLE SECOND.

That it be the second article of union, that the succession to the imperial crown of the said united kingdom, and of the dominions thereunto belonging, shall continue limited and settled in the same manner as the succession to the imperial crown of the said kingdoms of Great Britain and Ireland now stands limited and settled, according to the existing laws, and to the terms of union between England and Scotland.

ARTICLE THIRD.

That it be the third article of union, That the said united kingdom be represented in one and the same parliament, to be stiled The Parliament of the United Kingdom of Great Britain and Ireland.

ARTICLE FOURTH.

That it be the fourth article of union, That four lords spiritual of Ireland by rotation of sessions, and twenty-eight lords temporal of Ireland elected for life by the peers of Ireland, shall be the number to sit and vote on the part of Ireland in the house of lords of the parliament of the united kingdom ; and one hundred commoners (two for each county of Ireland, two for the city of Dublin, two for the city of Cork, one for the University of Trinity College, and one for each of the thirty-one most considerable cities, towns and boroughs), be the number to sit and vote on the part of Ireland in the house of commons of the parliament of the united kingdom :

That such act as shall be passed in the parliament of Ireland previous to the union, to regulate the mode by which the lords spiritual and temporal, and the commons, to serve in the parliament of the united kingdom on the part of Ireland, shall be summoned and returned to the said parliament, shall be considered as forming part of the treaty of union, and shall be incorporated in the acts of the respective parliaments by which the said union shall be ratified and established :

That all questions touching the rotation or election of lords spiritual or temporal of Ireland to sit in the parliament of the united kingdom, shall be decided by the house of lords thereof ; and whenever, by reason of an equality of votes in the election of any such lords temporal, a complete election shall not be made according to the true intent of this article, the names of those peers for whom such equality of votes shall be so given, shall be written on pieces of paper of a similar form, and shall be put into a glass, by the clerk of the parliaments at the table of the house of lords whilst the house is sitting ; and the peer or peers whose name or names shall be first drawn out by the clerk of the parliaments, shall be deemed the peer or peers elected as the case may be :

That any person holding any peerage of Ireland now subsisting, or hereafter to be created, shall not thereby be disqualified from being elected to serve if he

shall so think fit, or from serving or continuing to serve, if he shall so think fit, for any county, city, or borough of Great Britain, in the house of commons of the united kingdom, unless he shall have been previously elected as above, to sit in the house of lords of the united kingdom : but that so long as such peer of Ireland shall so continue to be a member of the house of commons, he shall not be entitled to the privilege of peerage, nor be capable of being elected to serve as a peer on the part of Ireland, or of voting at any such election ; and that he shall be liable to be sued, indicted, proceeded against, and tried as a commoner, for any offence with which he may be charged :

That it shall be lawful for his majesty, his heirs and successors, to create peers of that part of the united kingdom called Ireland, and to make promotions in the peerage thereof, after the union ; provided that no new creation of any such peers shall take place after the union until three of the peerages of Ireland, which shall have been existing at the time of the union, shall have become extinct ; and upon such extinction of three peerages, that it shall be lawful for his majesty, his heirs and successors, to create one peer of that part of the united kingdom called Ireland ; and in like manner so often as three peerages of that part of the united kingdom called Ireland shall become extinct, it shall be lawful for his majesty, his heirs and successors, to create one other peer of the said part of the united kingdom ; and if it shall happen that the peers of that part of the united kingdom called Ireland shall, by extinction of peerages or otherwise, be reduced to the number of one hundred, exclusive of all such peers of that part of the united kingdom called Ireland, as shall hold any peerage of Great Britain subsisting at the time of the union, or of the united kingdom created since the union, by which such peers shall be entitled to an hereditary seat in the house of lords of the united kingdom, then and in that case it shall and may be lawful for his majesty, his heirs and successors, to create one peer of that part of the united kingdom called Ireland, as often as any one of such one hundred peerages shall fail by extinction, or as often as any one peer of that part of the united kingdom called Ireland shall become entitled, by descent or creation, to an hereditary seat in the house of lords of the united kingdom ; it being the true intent and meaning of this article, that at all times after the union it shall and may be lawful for his majesty, his heirs and successors, to keep up the peerage of that part of the united kingdom called Ireland to the number of one hundred, over and above the number of such of the said peers as shall be entitled by descent or creation to an hereditary seat in the house of lords of the united kingdom :

That if any peerage shall at any time be in abeyance, such peerage shall be deemed and taken as an existing peerage ; and no peerage shall be deemed extinct, unless on default of claimants to the inheritance of such peerage for the space of one year from the death of the person who shall have been last possessed thereof ; and if no claim shall be made to the inheritance of such peerage, in such form and manner as may from time to time be prescribed by the house of lords of the united kingdom, before the expiration of the said period of a year, then and in that case such peerage shall be deemed extinct ; provided that nothing herein shall exclude any person from afterwards putting in a claim to the peerage so deemed extinct ; and if such claim shall be allowed as valid, by judgement of the house of lords of the united kingdom, reported to his majesty, such peerage shall be considered as revived ; and in

case any new creation of a peerage of that part of the united kingdom called Ireland shall have taken place in the interval, in consequence of the supposed extinction of such peerage, then no new right of creation shall accrue to his majesty, his heirs or successors, in consequence of the next extinction which shall take place of any peerage of that part of the united kingdom called Ireland.

That all questions touching the election of members to sit on the part of Ireland in the house of commons of the united kingdom shall be heard and decided in the same manner as questions touching such elections in Great Britain now are or at any time hereafter shall by law be heard and decided; subject nevertheless to such particular regulations in respect of Ireland as, from local circumstances, the parliament of the united kingdom may from time to time deem expedient:

That the qualifications in respect of property of the members elected on the part of Ireland to sit in the house of commons of the united kingdom, shall be respectively the same as are now provided by law in the cases of elections for counties and cities and boroughs respectively in that part of Great Britain called England, unless any other provision shall hereafter be made in that respect by act of parliament of the united kingdom:

That when his majesty, his heirs or successors, shall declare his, her, or their pleasure for holding the first or any subsequent parliament of the united kingdom, a proclamation shall issue, under the great seal of the united kingdom, to cause the lords spiritual and temporal, and commons, who are to serve in the parliament thereof on the part of Ireland, to be returned in such manner as by any act of this present session of the parliament of Ireland shall be provided; and that the lords spiritual and temporal and commons of Great Britain shall, together with the lords spiritual and temporal and commons so returned as aforesaid on the part of Ireland, constitute the two houses of the parliament of the united kingdom:

That if his majesty, on or before the first day of January one thousand eight hundred and one, on which day the union is to take place, shall declare, under the great seal of Great Britain, that it is expedient that the lords and commons of the present parliament of Great Britain should be the members of the respective houses of the first parliament of the united kingdom on the part of Great Britain; then the said lords and commons of the present parliament of Great Britain shall accordingly be the members of the respective houses of the first parliament of the united kingdom on the part of Great Britain; and they, together with the lords spiritual and temporal and commons, so summoned and returned as above on the part of Ireland, shall be the lords spiritual and temporal and commons of the first parliament of the united kingdom; and such first parliament may (in that case) if not sooner dissolved, continue to sit so long as the present parliament of Great Britain may now by law continue to sit, if not sooner dissolved; provided always, That until an act shall have passed in the parliament of the united kingdom, providing in what cases persons holding offices or places of profit under the crown in Ireland, shall be incapable of being members of the house of commons of the parliament of the united kingdom, no greater number of members than twenty, holding such offices or places as aforesaid, shall be capable of sitting in the said house of commons of the parliament of the united kingdom; and if such a number of members shall be returned to serve in the said house as to make the whole number of members of the said house holding such offices or places as aforesaid more than twenty, then

and in such case the seats or places of such members as shall have last accepted such offices or places shall be vacated, at the option of such members, so as to reduce the number of members holding such offices or places to the number of twenty ; and no person holding any such office or place shall be capable of being elected or of sitting in the said house, while there are twenty persons holding such offices or places sitting in the said house ; and that every one of the lords of parliament of the united kingdom, and every member of the house of commons of the united kingdom, in the first and all succeeding parliaments, shall, until the parliament of the united kingdom shall otherwise provide, take the oaths, and make and subscribe the declaration, and take and subscribe the oath now by law enjoined to be taken, made, and subscribed by the lords and commons of the parliament of Great Britain :

That the lords of parliament on the part of Ireland, in the house of lords of the united kingdom, shall at all times have the same privileges of parliament which shall belong to the lords of parliament on the part of Great Britain ; and the lords spiritual and temporal respectively on the part of Ireland shall at all times have the same rights in respect of their sitting and voting upon the trial of peers, as the lords spiritual and temporal respectively on the part of Great Britain ; and that all lords spiritual of Ireland shall have rank and precedence next and immediately after the lords spiritual of the same rank and degree of Great Britain, and shall enjoy all privileges as fully as the lords spiritual of Great Britain do now or may hereafter enjoy the same (the right and privilege of sitting in the house of lords, and the privileges depending thereon, and particularly the right of sitting on the trial of peers, excepted) ; and that the persons holding any temporal peerages of Ireland, existing at the time of the union, shall, from and after the union, have rank and precedence next and immediately after all the persons holding peerages of the like orders and degrees in Great Britain, subsisting at the time of the union ; and that all peerages of Ireland created after the union shall have rank and precedence with the peerages of the united kingdom, so created, according to the dates of their creations ; and that all peerages both of Great Britain and Ireland, now subsisting, or hereafter to be created, shall in all other respects, from the date of the union, be considered as peerages of the united kingdom ; and that the peers of Ireland shall, as peers of the united kingdom, be sued and tried as peers, except as aforesaid, and shall enjoy all privileges of peers, as fully as the peers of Great Britain ; the right and privilege of sitting in the house of lords, and the privileges depending thereon, and the right of sitting on the trial of peers, only excepted.

ARTICLE FIFTH.

That it be the fifth article of union, That the churches of England and Ireland, as now by law established, be united into one protestant episcopal church, to be called The United Church of England and Ireland ; and that the doctrine, worship, discipline, and government of the said united church, shall be and shall remain in full force for ever, as the same are now by law established for the church of England ; and that the continuance and preservation of the said united church, as the established church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union ; and that in like manner the doctrine, worship, discipline and government of the church

of Scotland, shall remain and be preserved as the same are now established by law, and by the acts for the union of the two kingdoms of England and Scotland.

ARTICLE SIXTH.

That it be the sixth article of union, That his majesty's subjects of Great Britain and Ireland shall, from and after the first day of January one thousand eight hundred and one, be entitled to the same privileges, and be on the same footing, as to encouragements and bounties on the like articles being the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the united kingdom and its dependencies; and that in all treaties made by his majesty, his heirs and successors, with any foreign power, his majesty's subjects of Ireland shall have the same privileges, and be on the same footing as his majesty's subjects of Great Britain:

That, from the first day of January one thousand eight hundred and one, all prohibitions and bounties on the export of articles, the growth, produce, or manufacture of either country, to the other, shall cease and determine; and that the said articles shall thenceforth be exported from one country to the other, without duty or bounty on such export:

That all articles, the growth, produce, or manufacture, of either country (not herein-after enumerated as subject to specific duties), shall from thenceforth be imported into each country from the other, free from duty, other than such countervailing duties on the several articles enumerated in the Schedule Number One A. and B. hereunto annexed, as are therein specified, or to such other countervailing duties as shall hereafter be imposed by the parliament of the united kingdom, in the manner herein-after provided; and that, for the period of twenty years from the union, the articles enumerated in the Schedule, Number Two, hereunto annexed, shall be subject on importation into each country from the other, to the duties specified in the said Schedule Number Two; and the woollen manufactures, known by the names of Old and New Drapery, shall pay, on importation into each country from the other, the duties now payable on importation into Ireland; salt and hops, on importation into Ireland from Great Britain, duties not exceeding those which are now paid on importation into Ireland; and coals, on importation into Ireland from Great Britain, shall be subject to burthens not exceeding those to which they are now subject:

That calicoes and muslins shall, on their importation into either country from the other, be subject and liable to the duties now payable on the same on the importation thereof from Great Britain into Ireland, until the fifth day of January one thousand eight hundred and eight; and from and after the said day, the said duties shall be annually reduced, by equal proportions as near as may be in each year, so as that the said duties shall stand at ten per centum from and after the fifth day of January one thousand eight hundred and sixteen, until the fifth day of January one thousand eight hundred and twenty-one. And that cotton yarn and cotton twist shall, on their importation into either country from the other, be subject and liable to the duties now payable upon the same on the importation thereof from Great Britain into Ireland, until the fifth day of January one thousand eight hundred and eight; and from and after the said

day, the said duties shall be annually reduced by equal proportions as near as may be in each year, so as that all duties shall cease on the said articles from and after the fifth day of January one thousand eight hundred and sixteen :

That any articles of the growth, produce, or manufacture of either country, which are or may be subject to internal duty, or to duty on the materials of which they are composed, may be made subject, on their importation into each country respectively from the other, to such countervailing duty as shall appear to be just and reasonable in respect of such internal duty or duties on the materials ; and that for the said purposes the articles specified in the said Schedule Number One, A. and B. shall be subject to the duties set forth therein, liable to be taken off, diminished, or increased, in the manner herein specified ; and that upon the export of the said articles from each country to the other respectively, a drawback shall be given equal in amount to the countervailing duty payable on such articles on the import thereof into the same country from the other ; and that in like manner in future it shall be competent to the united parliament to impose any new or additional countervailing duties, or to take off, or diminish such existing countervailing duties as may appear, on like principles, to be just and reasonable in respect of any future or additional internal duty on any article of the growth, produce, or manufacture of either country, or of any new or additional duty on any materials of which such article may be composed, or of any abatement of duty on the same ; and that when any such new or additional countervailing duty shall be so imposed on the import of any article into either country from the other, a drawback, equal in amount to such countervailing duty shall be given in like manner on the export of every such article respectively from the same country to the other :

That all articles, the growth, produce, or manufacture of either country, when exported through the other, shall in all cases be exported subject to the same charges as if they had been exported directly from the country of which they were the growth, produce, or manufacture :

That all duty charged on the import of foreign or colonial goods into either country shall, on their export to the other, be either drawn back, or the amount (if any be retained) shall be placed to the credit of the country to which they shall be so exported, so long as the expenditure of the united kingdom shall be defrayed by proportional contributions ; provided always, That nothing herein shall extend to take away any duty, bounty, or prohibition, which exists with respect to corn, meal, malt, flour, or biscuit ; but that all duties, bounties, or prohibitions, on the said articles, may be regulated, varied, or repealed, from time to time, as the united parliament shall deem expedient.

ARTICLE SEVENTH.

That it be the seventh article of union, that the charge arising from the payment of the interest, and the sinking fund for the reduction of the principal, of the debt incurred in either kingdom before the union, shall continue to be separately defrayed by Great Britain and Ireland respectively, except as herein-after provided :

That for the space of twenty years after the union shall take place, the contribution of Great Britain and Ireland respectively, towards the expenditure of the united kingdom in each year, shall be defrayed in the proportion of fifteen parts for Great Britain and two parts for Ireland ; and that at the expiration

of the said twenty years, the future expenditure of the united king (other than the interest and charges of the debt to which either country shall be separately liable) shall be defrayed in such proportion as the parliament of the united kingdom shall deem just and reasonable upon a comparison of the real value of the exports and imports of the respective countries, upon an average of the three years next preceding the period of revision ; or on a comparison of the value of the quantities of the following articles consumed within the respective countries on a similar average ; *videlicet*, beer, spirits, sugar, wine, tea, tobacco, and malt ; or according to the aggregate proportion resulting from both these considerations combined ; or on a comparison of the amount of income in each country, estimated from the produce for the same period of a general tax, if such shall have been imposed on the same description of income in both countries ; and that the parliament of the united kingdom shall afterwards proceed in like manner to revise and fix the said proportions according to the same rules, or any of them, at periods not more distant than twenty years, nor less than seven years from each other ; unless, previous to any such period, the parliament of the united kingdom shall have declared, as herein-after provided, that the expenditure of the united kingdom shall be defrayed indiscriminately, by equal taxes imposed on the like articles in both countries : That, for the defraying the said expenditure according to the rules above laid down, the revenues of Ireland shall hereafter constitute a consolidated fund, which shall be charged, in the first instance, with the interest of the debt of Ireland, and with the sinking fund applicable to the reduction of the said debt, and the remainder shall be applied towards defraying the proportion of the expenditure of the united kingdom, to which Ireland may be liable in each year : That the proportion of contribution to which Great Britain and Ireland will be liable, shall be raised by such taxes in each country respectively, as the parliament of the united kingdom shall from time to time deem fit ; provided always, That in regulating the taxes in each country, by which their respective proportions shall be levied, no article in Ireland shall be made liable to any new or additional duty, by which the whole amount of duty payable thereon would exceed the amount which will be thereafter payable in England on the like article : That, if at the end of any year any surplus shall accrue from the revenues of Ireland, after defraying the interest, sinking fund, and proportional contribution and separate charges to which the said country shall then be liable, taxes shall be taken off to the amount of such surplus, or the surplus shall be applied by the parliament of the united kingdom to local purposes in Ireland, or to make good any deficiency which may arise in the revenues of Ireland in time of peace, or be invested, by the commissioners of the national debt of Ireland, in the funds, to accumulate for the benefit of Ireland at compound interest, in case of the contribution of Ireland in time of war : provided that the surplus so to accumulate shall at no future period be suffered to exceed the sum of five millions : That all monies to be raised after the union, by loan, in peace or war, for the service of the united kingdom by the parliament thereof, shall be considered to be a joint debt, and the charges thereof shall be borne by the respective countries in the proportion of their respective contributions ; provided that, if at any time, in raising their respective contributions hereby fixed for each country, the parliament of the united kingdom shall judge it fit to raise a greater proportion of such respective contributions in one country within the year than in the other, or to set apart a greater proportion of

sinking fund for the liquidation of the whole or any part of the loan raised on account of the one country than of that raised on account of the other country, then such part of the said loan, for the liquidation of which different provisions shall have been made for the respective countries, shall be kept distinct, and shall be borne by each separately, and only that part of the said loan be deemed joint and common, for the reduction of which the respective countries shall have made provision in the proportion of their respective contributions: That, if at any future day the separate debt of each country respectively shall have been liquidated, or, if the values of their respective debts (estimated according to the amount of the interest and annuities attending the same, and of the sinking fund applicable to the reduction thereof, and to the period within which the whole capital of such debt shall appear to be redeemable by such sinking fund) shall be to each other in the same proportion with the respective contributions of each country respectively; or if the amount by which the value of the larger of such debts shall vary from such proportion, shall not exceed one hundredth part of the said value; and if it shall appear to the parliament of the united kingdom, that the respective circumstances of the two countries will thenceforth admit of their contributing indiscriminately by equal taxes imposed on the same articles in each, to the future expenditure of the united kingdom, it shall be competent to the parliament of the united kingdom to declare, that all future expence thenceforth to be incurred, together with the interest and charges of all joint debts contracted previous to such declaration, shall be so defrayed indiscriminately by equal taxes imposed on the same articles in each country, and thenceforth from time to time, as circumstances may require, to impose and apply such taxes accordingly, subject only to such particular exemptions or abatements in Ireland, and in that part of Great Britain called Scotland, as circumstances may appear from time to time to demand: That, from the period of such declaration, it shall no longer be necessary to regulate the contribution of the two countries towards the future expenditure of the united kingdom, according to any specific proportion, or according to any of the rules herein before prescribed; provided nevertheless, that the interest or charges which may remain on account of any part of the separate debt with which either country shall be chargeable, and which shall not be liquidated or consolidated proportionably as above, shall, until extinguished, continue to be defrayed by separate taxes in each country: That a sum not less than the sum which has been granted by the parliament of Ireland on the average of six years immediately preceding the first day of January in the year one thousand eight hundred, in premiums for the internal encouragement of agriculture or manufactures, or for the maintaining institutions for pious and charitable purposes, shall be applied, for the period of twenty years after the union, to such local purposes in Ireland, in such manner as the parliament of the united kingdom shall direct: That, from and after the first day of January one thousand eight hundred and one, all public revenue arising to the united kingdom from the territorial dependencies thereof, and applied to the general expenditure of the united kingdom, shall be so applied in the proportions of the respective contributions of the two countries.

ARTICLE EIGHTH.

That it be the eighth article of union, that all laws in force at the time of

the union, and all the courts of civil and ecclesiastical jurisdiction within the respective kingdoms, shall remain as now by law established within the same, subject only to such alterations and regulations from to time as circumstances may appear to the parliament of the united kingdom to require: provided that all writs of error and appeals, depending at the time of the union or hereafter to be brought, and which might now be finally decided by the house of lords of either kingdom, shall, from and after the union be finally decided by the house of lords, of the united kingdom; and provided, that, from and after the union, there shall remain in Ireland an instance court of admiralty, for the determination of causes, civil and maritime only, and that the appeal from sentences of the said court shall be to his majesty's delegates in his court of chancery in that part of the united kingdom called Ireland; and that all laws at present in force in either kingdom, which shall be contrary to any of the provisions which may be enacted by any act for carrying these articles into effect, be from and after the union repealed.

And whereas the said articles having, by address of the respective houses of parliament in Great Britain and Ireland, been humbly laid before his majesty, his majesty has been graciously pleased to approve the same; and to recommend it to his two houses of parliament in Great Britain and Ireland to consider of such measures as may be necessary for giving effect to the said articles: in order, therefore, to give full effect and validity to the same, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said foregoing recited articles, each and every one of them, according to the true import and tenour thereof, be ratified, confirmed, and approved, and be and they are hereby declared to be the Articles of the Union of Great Britain and Ireland, and the same shall be in force and have effect for ever, from the first day of January which shall be in the year of our Lord one thousand eight hundred and one; provided that before that period an act shall have been passed by the parliament of Ireland, for carrying into effect, in the like manner, the said foregoing recited articles.

II. And whereas an act, intituled, *An act to regulate the mode by which the lords spiritual and temporal, and the commons, to serve in the parliament of the united kingdom on the part of Ireland, shall be summoned and returned to the said parliament*, has been passed by the parliament of Ireland, whereby it is enacted, ' That the four lords spiritual shall be taken from among the lords spiritual ' of Ireland in the manner following; that is to say, that one of the four arch- ' bishops of Ireland, and three of the eighteen bishops of Ireland, shall sit in ' the house of lords of the united parliament in each session thereof, the said ' right of sitting being regulated as between the said archbishops respectively ' by a rotation among the archiepiscopal sees from session to session, and in ' like manner that of the bishops by a like rotation among the episcopal sees; ' That the primate of all Ireland for the time being shall sit in the first session of ' the parliament of the united kingdom, the archbishop of Dublin for the time ' being in the second, the archbishop of Cashel for the time being in the third, ' the archbishop of Tuam for the time being in the fourth, and so by rotation ' of sessions for ever, such rotation to proceed regularly and without interrup- ' tion from session to session, notwithstanding any dissolution or expiration of

ament: That three suffragan bishops shall in like manner sit according to ion of their sees, from session to session, in the following order; the lord p of Meath, the lord bishop of Kildare, the lord bishop of Derry, in the session of the parliament of the united kingdom; the lord bishop of oe, the lord bishop of Limerick, Ardfert and Aghadoe, the lord bishop of ore, in the second session of the parliament of the united kingdom; the bishop of Elphin, the lord bishop of Down and Connor, the lord bishop aterford and Lismore, in the third session of the parliament of the united lom; the lord bishop of Leiglin and Ferns, the lord bishop of Clayne, rd bishop of Cork and Ross, in the fourth session of the parliament of the d kingdom; the lord bishop of Killaloe and Kilfenora, the lord bishop of ore, the lord bishop of Clogher, in the fifth session of the parliament of nited kingdom; the lord bishop of Ossory, the lord bishop of Killala and nry, the lord bishop of Clonfert and Kilmacduagh, in the sixth session of ariament of the united kingdom; the said rotation to be nevertheless ct to such variation therefrom from time to time as is hereinafter provided: the said twenty-eight lords temporal shall be chosen by all the temporal of Ireland in the manner hereinafter provided; that each of the said lords oral so chosen shall be entitled to sit in the house of lords of the parliament: nited kingdom during his life; and in case of his death or forfeiture of f the said lords temporal, the temporal peers of Ireland shall, in the er hereinafter provided, choose another peer out of their own number to y the place so vacant. And be it enacted, That of the one hundred com- rs to sit on the part of Ireland in the united parliament, sixty-four shall be n for the counties, and thirty-six for the following cities and boroughs, et: For each county of Ireland two; for the city of Dublin two; for ty of Cork two; for the college of the Holy Trinity of Dublin one; for ty of Waterford one; for the city of Limerick one; for the borough of st one; for the county and town of Drogheda one; for the county and of Carrickfergus one; for the borough of Newry one; for the city of nny one; for the city of Londonderry one; for the town of Galway one; e borough of Clonmell one; for the town of Wexford one; for the town ughall one; for the town of Bandon Bridge one; for the borough of gh one; for the borough of Dundalk one; for the town of Kinsale one; e borough of Lisburne one; for the borough of Sligo one; for the borough herlough one; for the borough of Ennis one; for the borough of Dun- n one; for the borough of Downpatrick one; for the borough of Colrain for the town of Mallow one; for the borough of Athlone one; for the of New Ross one; for the borough of Tralee one; for the city of Cashel for the borough of Dungannon one; for the borough of Portarlinton for the borough of Enniskillen one. And be it enacted, That in case of mmoning of a new parliament, or if the seat of any of the said com- s shall become vacant by death or otherwise, then the said counties, or boroughs, or any of them, as the case may be, shall proceed to a new n; and that all the other towns, cities, corporations, or boroughs, other he aforesaid, shall cease to elect representatives to serve in parliament; o meeting shall at any time hereafter be summoned, called, convened, or for the purpose of electing any person or persons to serve or act, or be

' considered, as representative or representatives of any other place, town, city,
 ' corporation, or borough, other than the aforesaid, or as representative or repre-
 ' sentatives of the freemen, freeholders, householders, or inhabitants thereof,
 ' either in the parliament of the united kingdom or elsewhere, (unless it shall
 ' hereafter be otherwise provided by the parliament of the united kingdom); and
 ' every person summoning, calling, or holding any such meeting or assembly, or
 ' taking any part in any such election or pretended election, shall, being thereof
 ' duly convicted, incur and suffer the pains and penalties ordained and provided
 ' by the statute of provision and præmunire, made in the sixteenth year of the
 ' reign of Richard the Second. For the due election of the persons to be chosen
 ' to sit in the respective houses of the parliament of the united kingdom on the
 ' part of Ireland, be it enacted, That on the day following that on which the act
 ' for establishing the union shall have received the royal assent, the primate of
 ' all Ireland, the lord bishop of Meath, the lord bishop of Kildare, and the lord
 ' bishop of Derry, shall be and they are hereby declared to be the representatives
 ' of the lords spiritual of Ireland in the parliament of the united kingdom, for
 ' the first session thereof; and that the temporal peers of Ireland shall assemble
 ' at twelve of the clock on the same day as aforesaid, in the now accustomed place
 ' of meeting of the house of lords of Ireland, and shall then and there proceed
 ' to elect twenty-eight lords temporal to represent the peerage of Ireland in the
 ' parliament of the united kingdom, in the following manner; that is to say, the
 ' names of the peers shall be called over according to their rank, by the clerk of
 ' the crown, or his deputy, who shall then and there attend for that purpose; and
 ' each of the said peers, who, previous to the said day, and in the present parlia-
 ' ment shall have actually taken his seat in the house of lords of Ireland, and
 ' who shall there have taken the oaths, and signed the declaration, which are or
 ' shall be by law required to be taken and signed by the lords of the parliament
 ' of Ireland before they can sit and vote in the parliament hereof, shall, when
 ' his name is called, deliver, either by himself or by his proxy (the name of such
 ' proxy having been previously entered in the books of the house of lords of
 ' Ireland, according to the present forms and usages thereof) to the clerk of the
 ' crown or his deputy (who shall then and there attend for that purpose), a list
 ' of twenty-eight of the temporal peers of Ireland; and the clerk of the crown
 ' or his deputy shall then and there publickly read the said lists, and shall then
 ' and there cast up the said lists, and publickly declare the names of the twenty-
 ' eight lords who shall be chosen by the majority of votes in the said lists, and
 ' shall make a return of the said names to the house of lords of the first parlia-
 ' ment of the united kingdom; and the twenty-eight lords so chosen by the
 ' majority of votes in the said lists shall, during their respective lives, sit as repre-
 ' sentatives of the peers of Ireland in the house of lords of the united kingdom,
 ' and be entitled to receive writs of summons to that and every succeeding parlia-
 ' ment; and in case a complete election shall not be made of the whole number
 ' of twenty-eight peers, by reason of an equality of votes, the clerk of the crown
 ' shall return such number in favour of whom a complete election shall have
 ' been made in one list, and in a second list shall return the names of those peers
 ' who shall have an equality of votes, but in favour of whom, by reason of such
 ' equality, a complete election shall not have been made, and the names of the
 ' peers in the second list, for whom an equal number of votes shall have been so

' given, shall be written on pieces of paper of a similar form, and shall be put
 ' into a glass by the clerk of the parliament of the united kingdom, at the table
 ' of the house of lords thereof, whilst the house is sitting, and the peer whose
 ' name shall be first drawn out by the clerk of the parliament, shall be deemed
 ' the peer elected; and so successively as often as the case may require; and
 ' whenever the seat of any of the twenty-eight lords temporal so elected shall be
 ' vacated by decease or forfeiture, the chancellor, the keeper or commissioners
 ' of the great seal of the united kingdom for the time being, upon receiving a
 ' certificate under the hand and seal of any two lords temporal of the parlia-
 ' ment of the united kingdom, certifying the decease of such peer, or on view
 ' of the record of attainder of such peer, shall direct a writ to be issued under
 ' the great seal of the united kingdom, to the chancellor, the keeper or com-
 ' missioners of the great seal of Ireland for the time being, directing him or
 ' them to cause writs to be issued by the clerk of the crown in Ireland, to
 ' every temporal peer of Ireland, who shall have sat and voted in the house of
 ' lords of Ireland before the union, or whose right to sit and vote therein, or
 ' to vote at such elections, shall, on claim made on his behalf, have been
 ' admitted by the house of lords of Ireland before the union, or after the union
 ' by the house of lords of the united kingdom; and notice shall forthwith be
 ' published by the said clerk of the crown, in the London and Dublin Ga-
 ' zettes, of the issuing of such writs, and of the names and titles of all the
 ' peers to whom the same are directed; and to the said writs there shall be
 ' annexed a form of return thereof, in which a blank shall be left for the name
 ' of the peer to be elected, and the said writs shall enjoin each peer within
 ' fifty-two days from the teste of the writ, to return the same into the crown
 ' office of Ireland with the blank filled up, by inserting the name of the peer
 ' for whom he shall vote, as the peer to succeed to the vacancy made by de-
 ' mise or forfeiture as aforesaid; and the said writs and returns shall be
 ' bipartite, so as that the name of the peer to be chosen shall be written twice,
 ' that is, once on each part of such writ and return, and so as that each part
 ' may also be subscribed by the peer to whom the same shall be directed, and
 ' likewise be sealed with his seal of arms; and one part of the said writs and
 ' returns so filled up, subscribed and sealed as above, shall remain of record
 ' in the crown office of Ireland, and the other part shall be certified by the
 ' clerk of the crown to the clerk of the parliament of the united kingdom;
 ' and no peer of Ireland, except such as shall have been elected as representa-
 ' tive peers on the part of Ireland in the house of lords of the united kingdom,
 ' and shall there have taken the oaths, and signed the declaration prescribed
 ' by law, shall, under pain of suffering such punishment as the house of lords
 ' of the united kingdom may award and adjudge, make a return to such writ,
 ' unless he shall, after the issuing thereof, and before the day on which the
 ' writ is returnable, have taken the oaths and signed the declaration which are
 ' or shall be by law required to be taken and signed by the lords of the united
 ' kingdom, before they can sit and vote in the parliament thereof; which
 ' oaths and declaration shall be either taken and subscribed in the court of
 ' chancery of Ireland, or before one of his majesty's justices of the peace of
 ' that part of the united kingdom called Ireland, a certificate whereof, signed
 ' by such justices of the peace, or by the register of such court of chancery,
 ' shall be transmitted by such peer with the return, and shall be annexed to
 ' that part thereof remaining of record in the crown office of Ireland; and the

' clerk of the crown shall forthwith after the return day of the writs, cause to
 ' be published in the London and Dublin Gazettes, a notice of the name of
 ' the person chosen by the majority of votes ; and the peer so chosen shall,
 ' during his life, be one of the peers to sit and vote on the part of Ireland in
 ' the house of lords of the united kingdom ; and in case the votes shall be
 ' equal, the names of such persons who have an equal number of votes in their
 ' favour, shall be written on pieces of paper of a similar form, and shall be put
 ' into a glass by the clerk of the parliament of the united kingdom, at the
 ' table of the house of lords, whilst the house is sitting, and the peer whose
 ' name shall be first drawn out by the clerk of the parliament, shall be deemed
 ' the peer elected. And be it enacted, That in case any lord spiritual, being a
 ' temporal peer of the united kingdom, or being a temporal peer of that part
 ' of the united kingdom called Ireland, shall be chosen by the lords temporal
 ' to be one of the representatives of the lords temporal, in every such case,
 ' during the life of such spiritual peer being a temporal peer of the united
 ' kingdom, or being a temporal peer of that part of the united kingdom called
 ' Ireland, so chosen to represent the lords temporal, the rotation of represent-
 ' ation of the spiritual lords shall proceed to the next spiritual lord, without
 ' regard to such spiritual lord so chosen a temporal peer, that is to say, if such
 ' spiritual lord shall be an archbishop, then the rotation shall proceed to the
 ' archbishop whose see is next in rotation, and if such spiritual lord shall be a
 ' suffragan bishop, then the rotation shall proceed to the suffragan bishop
 ' whose see is next in rotation. And whereas by the said fourth article of
 ' union it is agreed, that, if his majesty shall, on or before the first day of
 ' January next, declare, under the great seal of Great Britain, that it is expe-
 ' dient that the lords and commons of the present parliament of Great Britain
 ' should be the Members of the respective houses of the first parliament of
 ' the united kingdom on the part of Great Britain, then the lords and commons
 ' of the present parliament of Great Britain shall accordingly be the members
 ' of the respective houses of the first parliament of the united kingdom on
 ' the part of Great Britain ; be it enacted, for and in that case only, That the
 ' present members of the thirty-two counties of Ireland, and the two members
 ' for the city of Dublin, and the two members for the city of Cork, shall be,
 ' and they are hereby declared to be, by virtue of this act, members for the
 ' said counties and cities in the first parliament of the united kingdom ; and
 ' that on a day and hour to be appointed by his majesty under the great seal
 ' of Ireland, previous to the said first day of January one thousand eight hun-
 ' dred and one, the members then serving for the college of the Holy Trinity
 ' of Dublin, and for each of the following cities or boroughs, that is to say,
 ' the city of Waterford, city of Limerick, borough of Belfast, county and town
 ' of Drogheda, county and town of Carrickfergus, borough of Newry, city of
 ' Kilkenny, city of Londonderry, town of Galway, borough of Clonmell, town
 ' of Wexford, town of Youghall, town of Bandon Bridge, borough of Armagh,
 ' borough of Dundalk, town of Kinsale, borough of Lisburne, borough of
 ' Sligo, borough of Catherlough, borough of Ennis, borough of Dungarvan,
 ' borough of Downpatrick, borough of Colerain, town of Mallow, borough
 ' of Athlone, town of New Ross, borough of Tralee, city of Cashel, borough
 ' of Dungannon, borough of Portarlinton, and borough of Euniskillen, or
 ' any five or more of them, shall meet in the now usual place of meeting of
 ' the house of commons of Ireland, and the names of the members then serving

' for the said places and boroughs, shall be written on separate pieces of paper,
 ' and the said papers being folded up, shall be placed in a glass or glasses, and
 ' shall successively be drawn thereout by the clerk of the crown, or his deputy,
 ' who shall then and there attend for that purpose ; and the first drawn name
 ' of a member of each of the aforesaid places or boroughs shall be taken as
 ' the name of the member to serve for the said place or borough in the first
 ' parliament of the united kingdom ; and a return of the said names shall be
 ' made by the clerk of the crown, or his deputy, to the house of commons of
 ' the first parliament of the united kingdom, and a certificate thereof shall be
 ' given respectively by the said clerk of the crown, or his deputy, to each of
 ' the members whose names shall have been so drawn : Provided always, That
 ' it may be allowed to any member of any of the said places or boroughs, by
 ' personal application, to be then and there made by him to the clerk of the
 ' crown, or his deputy, or by declaration in writing under his hand, to be
 ' transmitted by him to the clerk of the crown previous to the said day so
 ' appointed as above, to withdraw his name previous to the drawing of the
 ' names by lot ; in which case, or in that of a vacancy by death or otherwise
 ' of one of the members of any of the said places or boroughs, at the time of so
 ' drawing the names, the name of the other member shall be returned as afore-
 ' said as the name of the member to serve for such place in the first parliament
 ' of the united kingdom ; or if both members for any such place or borough
 ' shall so withdraw their names, or if there shall be a vacancy of both members
 ' at the time aforesaid, the clerk of the crown shall certify the same to the
 ' house of commons of the first parliament of the united kingdom, and shall
 ' also express, in such return, whether any writ shall then have issued for the
 ' election of a member or members to supply such vacancy ; and if a writ shall
 ' so have issued for the election of one member only, such writ shall be super-
 ' seded, and any election to be thereafter made thereupon shall be null and of
 ' no effect ; and if such writs shall have issued for the election of two members,
 ' the said two members shall be chosen accordingly, and their names being
 ' returned by the clerk of the crown to the house of commons of the parlia-
 ' ment of the united kingdom, one of the said names shall then be drawn, by
 ' lot, in such manner and time as the said house of commons shall direct ; and
 ' the person whose name shall be so drawn, shall be deemed to be the member
 ' to sit for such place in the first parliament of the united kingdom ; but if,
 ' at the time aforesaid, no writ shall have issued to supply such vacancy, none
 ' shall thereafter issue until the same be ordered by resolution of the house of
 ' commons of the parliament of the united kingdom, as in the case of any
 ' other vacancy of a seat in the house of commons of the parliament of the
 ' united kingdom. And be it enacted, That whenever his majesty, his heirs
 ' and successors, shall, by proclamation under the great seal of the united
 ' kingdom, summon a new parliament of the united kingdom of Great Britain
 ' and Ireland, the chancellor, keeper or commissioners of the great seal of
 ' Ireland, shall cause writs to be issued to the several counties, cities, the
 ' college of the Holy Trinity of Dublin, and boroughs in that part of the united
 ' kingdom called Ireland, specified in this act, for the election of members to
 ' serve in the parliament of the united kingdom, according to the numbers
 ' hereinbefore set forth ; and whenever any vacancy of a seat in the house
 ' commons of the parliament of the united kingdom, for any of the said
 ' counties, cities, or boroughs, or for the said college of the Holy Trinity of

As touching Wales, that was not always the feudal territory of the kingdom of England ; but having been long governed by a prince of their own, there were very many laws and customs used in Wales, utterly strange to the laws of England, the principal whereof they attribute to their king Howell Dha(a).

(a) There is a transcript of them, in British Museum. See Astle's pref. to the Harleian collection of MSS. in the Index to that noble collection.

' Dublin, shall arise, by death or otherwise, the chancellor, keeper, or commissioners of the great seal, upon such vacancy being certified to them respectively, by the proper warrant, shall forthwith cause a writ to issue for the election of a person to fill up such vacancy ; and such writs and the returns thereon respectively, being returned into the crown office in that part of the united kingdom called Ireland, shall from thence be transmitted to the crown office in that part of the united kingdom called England, and be certified to the house of commons in the same manner as the like returns have been usually or shall hereafter be certified ; and copies of the said writs and returns, attested by the chancellor, keeper, or commissioners of the great seal of Ireland for the time being, shall be preserved in the crown office of Ireland, and shall be evidence of such writs and returns, in case the original writs and returns shall be lost ; be it enacted, That the said act, so herein recited, be taken as a part of this act, and be deemed to all intents and purposes incorporated within the same.

III. That the great seal of Ireland may, if his majesty shall so think fit, after the union, be used in like manner as before the union, except where it is otherwise provided by the foregoing articles, within that part of the united kingdom called Ireland ; and that his majesty may, so long as he shall think fit, continue the privy council of Ireland, to be his privy council for that part of the united kingdom called Ireland.

Thus, this great and important work was happily and constitutionally accomplished ; and though Ireland has not, at present, reaped all the benefit which she might naturally have expected from the union, yet the time, I trust, is not far distant, when the " overflowing of British capital will find its way into that country ; will convert its bogs, into corn-fields, will cover its barren mountains, with forests ; dig its mines, cut its canals, erect its fabricks, explore new channels of commerce, and improve the old ones ; in a word, by supplying labour, will render the people industriously enlightened, contented, and happy."* —These blessings, however, may possibly be suspended by the measures which have unhappily been adopted, during the last twenty years, for the suppression of the illicit distillation, which has prevailed in the northern and western, and some of the central counties of Ireland.—On which interesting and important subject, the reader may derive considerable information, from two letters lately published by Mr. Chichester, on the oppressions and cruelties of Irish revenue officers ; and particularly from the very able review of those letters, in the *Edin. Rev.* for March, 1819, p. 441. The legislature, however, has lately interposed, to remedy, if possible, the evils alluded to ; and the act which it has lately passed (59 Geo. 3.) will, it is hoped, fully answer the laudable purpose for which it was intended.

* Dr. Watson, late Bishop of Landaff.

After king Edward I. had subdued Wales, and brought it immediately under his dominion, he first made a strict inquisition touching the Welsh laws within their several commotes and seigniores; which inquisitions are yet of record. After which, in the 12th of Edward I. the statute of Rutland was made, whereby the administration of justice in Wales, was settled in a method very near to the rule of the law of England. The preamble of the said statute is notable, viz.

“Edvardus Dei gratia rex Angliæ dominus Hiberniæ & dux
 “Acquitaniæ omnibus fidelibus suis de terra sua de Snodon & de
 “aliis terris suis in Wallia salutem in Domino. Divina Provi-
 “dentia quæ in sua dispositione non fallitur, inter alia suæ dispen-
 “sationis munera, quibus nos & regnum nostrum Angliæ decorari
 “dignata est, terram Walliæ cum incolis suis prius nobis JURI
 “FEODALI SUBJECTAM, tam sui gratia in proprietatis nostræ
 “dominium, obstaculis quibuscunque cessantibus, totaliter & cum
 “integritate convertit, & coronæ regni prædicti tantum partem
 “corporis ejusdem annexuit & univit. Nos, &c.” (a).

According to the method in that statute prescribed, has the method of justice been hitherto administered in Wales, with such alterations and additions therein, as have been made by the several subsequent statutes of 27 and 34 H. VIII. &c. (B).

(a) Vide note (B) and (D) on this chapter.

(B) Wales, unconquered and uncultivated, for ages preserved its independence, against the continued attempts of a great and of a powerful people to subject it. Whether this may with greater propriety be ascribed to courage, to the situation of the country, or to a want of that, whatever it may be, which stimulates the ambition of conquerors, is not perhaps easy to determine: certain however it is, that the Saxons, instigated more by revenge, than by any solid advantage which could possibly have been derived from the conquest of such a country, continually exerted every effort to subdue it.

At what period the Britons were first called *WELSH*, or from whence the word *Wallia* is derived, is not, I believe, as yet ascertained: laborious may have been the researches, various, no doubt, are the conjectures. From whatever origin the word may have been derived, it is not, however, unreasonable to suppose, that it was at first a term of reproach applied by the Saxons, the Welsh having almost invariably denominated themselves *Cymry*.

Blackstone, speaking of the Welsh, remarks, that when the Saxons themselves were converted to Christianity, and settled into regular and potent governments, the retreat of the ancient Britons grew every day narrower; that they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence*. Of this there may be no question; a minute detail, therefore, of their reciprocal

* Com. 1 v. oct. 93.

depredations, from the æra of the Saxon conquest, to that of Edward the First, would be of very little, if of any, consequence: in truth their wars were equally savage and ferocious; each, as the scale of fortune preponderated, exhibiting massacre and devastation, fire and the sword. "Very early" (adds Blackstone) in our history, we find their princes doing homage to the "crown of England, till at length, in the reign of Edward the First, who may "justly be styled the conqueror of Wales, the line of their ancient princes "was abolished, and the king of England's eldest son became, as a matter "of course, their titular prince*." If this assertion be but a little investigated, it may, perhaps, in the end, a little be doubted.

Under the conduct of Llewellyn ap Jorweth, and his son and successor David ap Llewellyn, the Welsh carried on a war with various success against the English. Llewellyn ap Gryffidd, who succeeded his uncle David ap Llewellyn, was the last prince of Wales of the British blood; and it is in general admitted, that by the death, or, as some suggest, by the assassination of this prince, the Welsh were at length, not totally, though in a great measure, conquered by Edward the First; for it is probable that this conquest extended, not to any other counties than those which are specified in the statute of Wales; † viz. Merioneth, Carnarvon, Anglesey, and Flintshire, and the counties of Carmarthen and Cardigan in South Wales; in which counties only, Edward erected castles ‡. Its old constitution, whatever that might have been, was now destroyed; and no good one substituted in its place. That care was intrusted to lords marchers—a form of government of a very singular kind; a strange heterogeneous monster, something between hostility and government §. With Llewellyn expired the distinction of his nation; and though foreign conquests might add to the glory, yet this added to the felicity of England. To incorporate the victors with the vanquished, Edward granted lands in Wales to his followers; to prevent security and concealment, he destroyed the woods which had so often afforded safety to the enemy; and, the more effectually to subjugate the country, castles were erected, which he took especial care sufficiently to garrison. However lenient, or however politic the conduct yet surely it must have been accompanied with some degree of severity, or the brave Llewellyn would not so feelingly have complained—"Nam nos adei "spoliati eramus (says Llewellyn) immo in servitutem redacti per justiciarios & ballivos regis, amplius quam si Saraceni essemus, vel Judei deus: "ciavimus domino regi, sed semper mittebantur justiciarii et ballivi feroces et crudeliores; et quando illi saturati erant per injustas exactiones "alii de novo mittebantur ad populum exorciandum, in tantum quod Walensis malebat mori quam vivere ¶." Thus woefully experiencing the cruelty and rapacity of the English, the Welsh, however reduced, were unwilling peaceably to submit to the power of Edward, and therefore boldly insisted on being governed by a prince of their own country. To effect this purpose, Edward dispatched his queen, when pregnant, to Caernarvon castle, where she was delivered of a son ¶, who in consequence was honoured with the title of Prince of Wales. By this politic condescension, Edward complied

* Com. 1 v. oct. 94.

† Statutum Wallie—12 Edw. I. Appendix to 4to. Ed. ed. stat. p. 3.

‡ Bar. Ob. Stat. 104.

§ Ed. Burke.

¶ Appendix to Wynne's Hist. of Wales—Bar. Ob. Stat. 324.

¶ Edward II.

with the literal import of the request, but at the same time avoided the spirit and intention of it. Thus the territory of Wales, as Mr. Justice Blackstone conceives*, became entirely re-annexed, by a kind of feudal resumption, to the dominion of the crown of England†; or, as the statute of Rhudhlan ‡ expresses it—"terra Walliæ cum incolis suis, prius regi *jure feudali subjecta*, (of which "homage was the sign) jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita §." The expression *jure feudali subjecta*, is somewhat remarkable, as it is believed|| that no instance can be found of a *jus feudale* prevailing in ENGLAND: we hear indeed of the word *feodum*, and the distinction between the *feodum novum* and *feodum antiquum*, but of a REGULAR SYSTEM of feudal law, which this expression seems to indicate, there are but very slight traces. Edward however was a conqueror, and had a right to make use of his own words, in the preamble to his own law. It may not be impertinent to observe, that though of late years some very ingenious attempts have been made to explain our ancient common law, by feudal principles, yet it is more than probable, that neither Lyttleton nor his learned and laborious commentator, knew that such a law had ever prevailed in any part of Europe.

The more effectually to blend the vanquished with their conquerors, Edward was not only desirous of having the laws of Wales reviewed, but of having them compared, and if possible rendered consonant with those of England; to accomplish which he directed proper inquiries to be made before certain commissioners, over whom the bishop of St. David's was appointed to preside. The certificates and returns of the commissioners, are printed in the appendix to the Laws of Hoel Dha, or The Good, the legislator ¶ of the Britons, and contain many curious particulars **. It was, with truth, conceived, that the custom of gavel-kind had in a violent degree promoted public and hereditary feuds; sovereignties as well as private property being, by the custom of Wales, divisible among all the male issue, whether legitimate or not.

Some have thought that the equal partition of private estates among the male issue, tends not only to the promotion of agriculture, but to the increase of population; and that in a government founded on equality and liberty, it is the medium which curtails the wealth and the power of individuals. Others conceive, that the custom of lands descending to the youngest son, which we term Borough-English, in preference to the other sons, has a more rational foundation than the exclusive descendibility to the eldest; he being supposed, and not very unreasonably, more capable of maintaining himself than the youngest; who might probably be of such tender years, as to be altogether unable to provide for himself, on the decease of his ancestor.

* Com. 1 vol. oct. 94.

† Vaugh. 400.

‡ 10 Edw. I. Roteland, or more properly Rhudd-lan, or Rhyd-land.

§ Vide note (D) on this chapter.

|| Obs. on Stat. 107.

¶ The prince of Wales, without question, had legislative authority; he could, *ad libitum*, alter, abrogate, and enact laws; yet in the exercise of this extensive power, whether delegated or assumed, it became

him to act in strict conformity with the public good; for the disapprobation of the ancient Britons was shewn, not by ineffectual petitions, but by the sword—when the sovereign ceased to be deserving, he ceased to be a prince. There is a transcript of the laws of Hoel Dha in the Harleian collection of MS. in the British Museum. See Astley's Pref. to the index of that collection.

** Bar. Obs. on Stat. 105.

In consequence of the inquiries which Edward had directed to be made, the custom of gavelkind, notwithstanding the distraction which was the result of its existence, with some other customs which had long been prevalent in Wales, was retained; others indeed were altered, and some were abolished, by the statute of Wales, which was made in the 12th year of the reign of Edward the First, A. D. 1284. This statute bears date "apud Rothelanum (Rhyd-land in Flint-shire) die Dominica in medio quadragesimæ anno regni nostri duodecimo." Barrington* observes on this statute, that it is certainly no more than regulations made by the king in council for the government of Wales, which, if the preamble be credited, was now totally subdued. This law, though it has been but little attended to, either by lawyers or historians, merits particular notice, because it not only makes known what were then the laws and the customs of Wales, but, by its remedial injunctions, discovers likewise what, at that time, was the law of England.—By this statute many material alterations were made in many parts of their laws, to reduce them nearer to the standard of the English, especially in the forms of their judicial proceedings: but they still retained very much of their original polity, and in particular their rule of inheritance†; for their custom of gavelkind, was continued till the time of Henry the Eighth. Notwithstanding these seemingly good intentions of Edward, the manners of the Welsh followed the genius of their own government. The people were ferocious; restive, savage, and uncultivated: sometimes composed, never pacified. Wales within itself was in perpetual disorder, and kept the frontier of England in perpetual alarm. Benefits from it to the state, there were none. Wales was known only to England by incursions and invasions‡. Many of the Welsh, from the desire of plunder§, or from a rooted antipathy against their conquerors, were still inclined to disorder; and under the conduct of Owen Glyndwr, emboldened by a confederacy with the potent earls of Worcester and Northumberland, their untractable spirit broke forth in insurrection. Henry the Fourth had the good fortune to defeat this formidable combination, and by the decisive battle of Huske, put an end to the aspiring hopes of Owen. This was the last struggle which the Welsh made for the recovery of their liberties, and the English, now having entirely subjected them, treated them rather as slaves than as subjects. Subsequent to the statute of Wales, and anterior to the subjugation by Henry, their provincial immunities had been at different times abridged; now, by an ill-judged severity, they were prohibited from the enjoyment of any offices, and from the purchasing of any lands:—even penal laws were enacted to prevent the English from intermarrying with the Welsh||. Thus, instead of healing the wounds occasioned by insurrection, was the breach which subsisted between the two nations extended. All this while Wales rid this kingdom like an *incubus*—it was an unprofitable and oppressive burthen. The march of the human mind is slow. It was not, until after two centuries, discovered, that by an eternal law, Providence had decreed vexation to violence, and poverty to rapine. Our ancestors did however at length open their eyes to the ill husbandry of injustice. They found that the tyranny of a free people could, of all tyrannies, the least be endured; and that laws made against an whole nation, were not the most effectual

* Obs. on Stat. 104.

† Blac. Com. 1 vol. sect. 94.

‡ Ed. Burke,

§ Barr. on Stat. 329.

|| Barr. Obs. Statu 324. 329.

methods for securing its obedience*. Accordingly, in the reign of Henry VII. who was descended from the princes of North Wales, the course was entirely altered, and the Welsh experienced greater favour. By his son and successor Henry VIII. the union of England and Wales was happily and politically effected. Previous steps having been taken to introduce a union of laws between the two countries †, the finishing stroke to the independency of the Welsh was, as Blackstone remarks ‡, given by the stat. 27 Hen. VIII. c. 26. which at the same time gave the utmost advancement to their civil prosperity. By this medium, political order was established; the military power gave way to the civil; the marches were turned into counties. The title of it is, “an act concerning laws to be used in Wales §.” By this statute it is enacted, First, that the dominion of Wales shall be for ever united to the kingdom of England. Secondly, that all Welshmen born shall have the same liberties as other the king’s subjects. Thirdly, that lands in Wales shall be inheritable according to the English tenures and rules of descent. Fourthly, that the law of England, and no other, shall be used in Wales, beside many other regulations of the police of this principality. But that a nation should have a right to English liberties, and yet no share at all in the fundamental security of those liberties, the grant of their own property, seemed a thing so incongruous, that eight years after, that is, in the thirty-fifth year of that reign, a complete and not an ill-proportioned representation, by counties and boroughs, was bestowed upon Wales, by act of parliament ||. From that moment, as by a charm, tumult subsided; obedience was restored; peace, order, and civilization, followed in the train of Liberty:—when the day-star of the English constitution had arisen in their hearts, all was harmony within and without ¶.—

- - - - Simul alba nautis
 Stella refulsit,
 Defluit saxis agitatus humor:
 Concidunt venti, fugiuntque nubes,
 Et minax (quod sic voluere) ponto
 Unda recumbit.

The statute 34 and 35 Henry VIII. c. 26. entitled, “an act for certain ordinances in the king’s dominion and principality of Wales**,” confirms the other act. This act not only adds farther, but also contains a more complete code of regulations for the administration of justice; with such precision, and such accuracy, that no one clause of it, according to Mr. Barrington ††, hath ever yet occasioned a doubt, or required an explanation.

It begins by dividing Wales into twelve shires; before, as lord Herbert of Cherbury asserts (in his Life of Henry VIII.) it consisted of one hundred and forty lordships marchers, with *jura regalia*, and the grand object of this statute was to reduce their jarring customs to uniformity. In short, this act reduced Wales into the same order in which it at present stands; differing from the kingdom of England only in a few particulars (such as having courts within

* Ed. Burke.

† Barr. Obs. Stat. 457.

‡ Com. 1 vol. oct. 94.

§ 4to. Stat. vol. 2. pa. 240.

|| 34 & 35 Hen. 8. c. 26. sec. 110.

¶ Edm. Burke.

** 4to. Stat. vol. 2. pa. 348.

†† Obs. on Stat. 456.

itself INDEPENDENT of the process of Westminster-hall), and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself*. It hath already been said, that this statute is so clear, that it hath not ever required either exposition or alteration. Lord Bacon † hath just abridged some of the regulations, thinking perhaps, that they spoke sufficiently for themselves. Mr. Justice Doderidge, pursued the same mode, in his account of the principality, without offering any other observation than that the justices of the great session have the same powers with “the antient justices in eyre.” He could not by this mean, that the justices in eyre, had authority to decide causes in a court of equity, which the justices of the great session have so long exercised, that it cannot now be disputed: how they originally obtained this jurisdiction cannot be easily ascertained, as in the 34 and 35 Henry VIII. which enumerates every officer in the courts of law, there is not the least allusion to any proceedings in equity ‡.

Thus were united a people hitherto distracted with continual animosity; and thus, to use the words of the elegant commentator, were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow citizens with their conquerors §.

With the greatest deference to Mr. Justice Blackstone and Mr. Barrington, the statute of 34 and 35 Henry VIII. cannot now be deemed a complete code of regulation for the administration of justice in Wales: in truth, whoever attentively considers the mode of judicial proceedings, as conducted in Wales, compared with that which is pursued in this kingdom, must immediately acknowledge the manifest superiority of the latter. It is true, that they have in Wales a court, somewhat improperly called the court of grand sessions, in which is transacted all professional business, either at law or in equity.—But if it be apparent, that the common people are in general ignorant of the English language—that where the cause of action exceeds ten pounds, the parties may try it at the next English county, by which means either the plaintiff or the defendant is frequently obliged at a great expence, and at great trouble, to bring witnesses from a very distant part, to try a very trifling cause, and by such means affording to the opulent, too frequent opportunities to harass and oppress the indigent—it must be obvious that what was originally intended as a benefit, is now become a grievance—and that, as the reason ||, for trying causes in the next English county, has long since ceased, the practice should cease also.—Were the judicial proceedings in every respect the same as in England, and Wales joined to the English circuits, there would not then, perhaps, exist any partial distinction between the inhabitants of England and of Wales—they would then have the same laws, the same justice, the same government, and in time the same language. On the whole, it is to be hoped by every one who understands, and understanding wishes to promote the real interest of the principality, that every distinction between England and Wales, whether arising from a difference of manners and of customs—from the mode of administering justice, or even from the language itself, may be entirely done away.

* Blac. Com. 1 vol. oct. 95.

† In his Law Tracts.

‡ Obs. on Stat. 459.

§ Blac. Com. 1 vol. oct. 94.

|| Which was to procure a more impartial trial, on account of the party actions which generally prevailed in Wales.

Touching the Isle of Man. This was sometimes parcel of the kingdom of Norway, and governed by particular laws and customs of their own; though many of them hold proportion, or bear some analogy, to the laws of England, and probably were at first and originally derived from thence; seeing the kingdom of Norway, as well as the Isle of Man, have anciently been in subjection to the crown of England. Vide *Legis Willi. primi*, in Lambard's Saxon Laws (C).

In Hilary 21 Geo. II. the great question, "whether the court of grand sessions in Wales possessed a jurisdiction *exclusive* of that of the court of king's bench," was agitated. The case is elaborately reported in 1 *Wils.* 193. The determination was in favour of the *exclusive* jurisdiction.—But it has been since over-ruled. See *Doug.* 202. and note (D) on this chapter.

(C) The Isle of Man is a distinct territory from England, and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there*. It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; then again to the crown of England: at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley, by letters patent 7 Henry IV.

Those who formerly possessed this territory stiled themselves kings. *Rex Mannie & Insularum*, was a common inscription on their seals, and in truth they were so titled by their superior lords. *Sciatas*, says Henry the third †, *quod dilectus et fidelis noster Reginaldus rex de Man venit ad fidem & servitium nostram & nobis homagium fecit*. But they were also, in later times, titled the lords of *Man*, *domini Mannie*, by which title the dignity was not so restrained that the name of king was taken away. For it is related, that the lords of Man had withal the name of king, and might use also a crown of gold: so says Thomas of Walsingham, where he relates, that William Montague, earl of Salisbury, under Richard II. sold the isle to sir William Scrop; *Willielmus Scrop ‡ emit de domino Willielmo de Monteaculo comite de Sarum insulam Eubonie* (which is the old name of the isle) *CUM CORONA, NEMPE DOMINUS HUIUS INSULE REX VOCATUR, CUI ETIAM FAS EST CORONA AUREA CORONARI*: and another to the same purpose in the public library at Oxford §; *Est nempe jus illius insule ut quisquis illius s'i dominus rex vocetur, cui etiam fas est corona regia coronari*. But in those gifts of this island, which were made by our kings, to such as have been since stiled kings of Man, the name of king or kingdom is not to be found, only the title of *lord*; but with liberty to hold it as amply

* 4 Inst. 284. 2 And. 116.

† Pat. 3. Hen. 3. membr. 1.

‡ 7 Rich. 2. sub. ann. D. 1393. p. 337.

§ Chron. ms. ab. ann. 43 H. 3. and 7 H. 5. cui scioltus aliquis nomen Guil. Riskanger temere nuper prefexit sub. ann. D. 1392.

and as freely as any had before held it. Whilst it was in the hands of the earl of Salisbury, he stiled himself only lord of Man, *Seignor de Man*.

By the name of lordship also, it was given by Henry the Fourth to Henry earl of Northumberland, as an island won by conquest from sir William Scrop. The words of the patent are remarkable:—he gives him * *insulam castrum Pelam et dominium de Man ac omnia insulas et dominia eidem insulæ de Man pertinentia, quæ fuerunt Willielmi le Scrop chivaler defunctique nuper in illa sua conquestati fuimus et ipsum sic conquestatum decrevimus & quæ ratione conquestus illius tanquam conquestata cepimus in manum nostram, quæ quidem decretum & conquestus in presenti parlamento nostro* (that is the parliament of the first year of his reign) *de assensu dominorum temporalium in eodem parlamento existentium quoad personam prefati Willielmi ac omnia terras et tenementa bona et catalla sua tam infra dictum regnum quam extra ad supplicationem communitatis dicti regni nostri affirmata existunt.*

Some years afterwards the earl of Northumberland forfeited it, and it was in the same words given to sir John Stanley†, to hold in fee by the tenure of two falcons, to be presented to the king at his coronation; but the tenure of the earl of Northumberland was to carry the sword called Lancaster sword, which Henry the Fourth wore when he first arrived in England, at the coronations of the king and his successors‡.

In his lineal descendants it continued for eight generations, till the death of Ferdinand, earl of Derby, A. D. 1594; when a controversy arose concerning the inheritance, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent§, the island was seized into the queen's hands. Afterwards, various grants were made of it by king James the First; all which being expired or surrendered, it was granted 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, A. D. 1735, the male line of earl William failing, the duke of Athol succeeded to the island, as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein, by assenting to or dissenting from laws, and exercising an appellat jurisdiction. Yet though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island, to the king of Great Britain in council, as is apparent from the case hereafter stated. But the distinct jurisdiction of this little subordinate royalty, being found inconvenient for the purposes of public justice, and for the revenue, authority was given to the Treasury by the 12 Geo. I. c. 28. to purchase the interest of the then proprietors, for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39. whereby the whole island and all its dependencies, so granted, (except the landed property of the Athol family, their manerial rights and emoluments, and the patronage of the bishoprick || and other ecclesiastical

* Pat. 1 H. 4. part. 5. membr. 36.

† Pat. 7 H. 4. part. 2. membr. 18.

‡ Seld. Tit. Hon. 1. 3.

§ Camden. Eliz. A. D. 1594.

|| The bishoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by statute 33 Hen. VIII. c. 31.

Berwick was sometimes parcel of Scotland, but was won by conquest by king Edward I. and after that lost by king Edward II. and afterwards regained by Edward III. It was governed by the laws of Scotland, and their own particular customs, and NOT ACCORDING TO THE RULES OF THE COMMON LAW OF ENGLAND, rather than as by custom it is there admitted: as in *Liber Parliamenti*, 21 Edw. 1. in the case of Moyne and Bartlemew, *pro te*, in Berwick. Yet now by charter, they send burgesses to the parliament of England (D). Vide *Rot. Parl.* 16 R. II. 41, 42.

offices) for the sum of 70,000*l.* are unalienably vested in the crown, and subjected to the regulations of the British excise and customs*.

The earl of Derby, king of the Isle of Man, made a decree concerning lands there; the person, against whom the decree was made, appealed to the king of Great Britain in council, and the principal question was, whether an appeal might lie before the king in council, there being no reservation in the grant, of the Isle of Man by the crown, of the right of appeal to the crown. It was urged for the appeal, that it appearing Henry IV. had granted the Isle of Man, to the earl of Derby's ancestors, to hold by homage and other services, though there was no reservation of the right of appeal to the crown, that liberty was plainly implied. That such a liberty of appeal lay in all cases where there was a tenure of the crown; that it was the right of the subject to appeal to the sovereign to redress the wrong done in any court of justice; nay, if there had been express words in the grant to *exclude* appeals, they had been void: because the subject had an inherent right, inseparable from him as subject, to apply to the crown for justice. That the king, as the *main of justice*, had an inherent right inseparable from the crown, to distribute justice among his subjects; and if this were a right in the subjects, a grant could deprive them of it; the consequence of which would be, that all cases where there were words exclusive of such right of appeal, the grant would be construed to be deceived, and his grant to be void.

Lord chief justice Parker, who assisted upon the occasion, thought that the king in council had necessarily a jurisdiction in this case, in order to prevent a failure of justice; whereupon their lordships proceeded in the appeal, and determined in favour of the appellant†.

(D) The town of Berwick-upon-Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced by Edward I. into the possession of the crown of England; and, during such subjection, received from that prince a charter, which (after its subsequent cession by Edward Baliol, he for ever united to the crown and realm of England) was confirmed by Edward III. with some additions; particularly that it should be governed, by the laws and usages which it enjoyed, before its reduction by Edward I. Its

* *Blac. Com.* 1 v. 105.

† *Christian v. Corren*, Peere Wms. 1 v. 329. 2 Eq. Ca. Abr. 81. pl. 3.

constitution was new-modelled, and put upon an English footing by a charter of James I.* and all its franchises were confirmed in parliament by the 22 Edw. IV. c. 8. and the 2 Jac. I. c. 28. therefore though it has some local peculiarities, derived from the ancient laws of Scotland, yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or not. And therefore it was, (perhaps superfluously), declared by the 20 Geo. II. c. 42. that where England only is mentioned in an act of parliament, the same notwithstanding hath and shall be deemed to comprehend the dominion of Wales and Town of Berwick-upon-Tweed. And tho' certain writs, from the courts at Westminster, do not usually run into Berwick, any more than into the principality of Wales, yet it hath been solemnly adjudged, that all prerogative writs, (as those of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c.) may issue to Berwick, as well as to every other of the dominions of the crown of England; and that indictments and other local matters arising in the town of Berwick, may be tried by a jury of the county of Northumberland†.

Towards the latter end of the reign of George the Second, the constitution of Berwick was legally and thoroughly investigated. The cause which gave rise to the investigation, was that of the King against Cowle; which came before the court of king's bench, in the form of a motion, to shew cause "why a supersedeas should not issue to a *certiorari*, which had been directed to the mayor and corporation, justices of Berwick‡."—After all the charters of the corporation had been produced and minutely inspected, and after many elaborate arguments, by counsel, on both sides, the earl of Mansfield delivered the opinion of the court to the following effect.

The objections urged against the *certiorari* were principally—that the court of king's bench had no jurisdiction over the town and borough of Berwick, or any local matters arising there; because it was not to be deemed part of the realm of England, and the king's writ did not run there; consequently, the court had no authority to remove a record from thence, by writ of *certiorari*, for any purpose whatsoever.

That supposing the court might, for some purposes, have jurisdiction, yet the end for which the *Certiorari* was desired, could not possibly be obtained.

The best way, said lord Mansfield, of considering this question, is concisely to deduce the condition and constitution of Berwick, contrasted with Wales; to shew that arguments from the case of Wales hold to Berwick, equally at least in all respects; in many *a fortiori*.

Edward the First conceived the great design of annexing all other parts of the island of Great Britain to the realm of England. The better to effectuate his idea, as time should offer occasion, he maintained "that all the parts thereof, not in his own hands or possession, were holden of his crown." The consequence of this doctrine was, that, by the feudal law, supreme jurisdiction resulted to him in right of his crown, as sovereign lord, in many cases which he might lay hold of; and when the territories should come into

* For the several charters, particularly that of James the First, and under which the corporation of Berwick claim all their privileges, see 2 Burr. 836. seq.

† Blac. Com. 1 v. 99. 1 Sid. 382. 462. 2 Show. 365. Cro. Jac. 543. 2 Roll Abr. 292. Stat. 11 Geo. 1. c. 4.

‡ 2 Burr. 834. seq.

his possession, they would come back as parcel of the realm of England, from which (by fiction of law at least) they had been originally severed.

This doctrine was literally true, as to the counties palatine of Chester and Durham.

But, no matter upon what foundation, he maintained that the principality of Wales was holden of the imperial crown of England; he treated the prince of Wales as a rebellious vassal; subdued him; and took possession of the principality. Whereupon, on the 4th of December in the 9th year of his reign, he issued a commission to inquire "*per quas leges et per quas consuetudines antecessores nostri reges regere consueverant principem Walliæ et Barones Wallens Walliæ et pares suos et alios inferiores et eorum pares, &c.*"*.

If the principality was feudatory, the conclusion necessarily followed; that it was under the government of the king's laws, and the king's courts, "in cases proper for their interposition;" though like counties palatine, they had peculiar laws, and peculiar customs, *jura regalia*, and complete jurisdiction at home.

There was a writ issued at the same time to all his officers in Wales, "to give information to the commissioners; and also many interrogatories, specifying the points to be inquired into. The statute of Rutland† refers to this inquiry. By that statute he does not annex Wales to England, but recites it as a consequence of its coming into his hands—" *Divina Providentia terram Walliæ prius nobis jure feudali subjectam, jam in proprietatis nostræ dominium convertit, et coronæ regni Angliæ TANQUAM PARTEM CORPORIS EJUSDEM, annexavit et univit.*"

The 27 H. VIII. c. 26. adheres to the same principle, and recites "that Wales EVER HATH BEEN incorporated, annexed, united, and subject to, and under the imperial crown of this realm, as a very member and joint of the same."

Edward the First having succeeded as to Wales, maintained also, "that Scotland was holden of the crown of England."

The jurisdiction, which resulted to him as superior lord, he often exercised, as sitting in this court. And as the court exercised that jurisdiction which resulted to the king in capacity of superior lord of Scotland; a *fortiori* it did so, when the country came into the king's possession. Therefore it was that the court of king's bench actually sat at Roxburgh in Scotland.

While he continued in possession of Scotland, 30 Ed. 1. he granted a charter to the town and borough of Berwick, under the great seal of England, notwithstanding he then had a great seal of Scotland. The charter requires the Mayor to be sworn before his chancellor or treasurer and barons of his exchequer in Scotland; and the writ to choose a coroner, is to issue out of his chancery in Scotland. He seems to consider the whole country as united into one realm: for the privileges are given—" *per totum regnum et potestatem nostram in terra et potestate nostra.*"

In a few years Berwick, with the rest of Scotland, was lost; and continued so, many years.

* Rotul. Walliæ, 9 Ed. 1. m. 5. Leges Walliæ, Hoeli Boni, 518. published by Wotton.

† 12 Ed. 1. See it in the 2d vol. of the book of old statutes, intitled "Statuta Walliæ."

Edward the Third renounced all pretension to the kingdom of Scotland, in property, or superiority, *divisum à regno Angliæ*.

Edward the Third procured from King Edward Baliol, and the parliament of Scotland, a grant and cession of Berwick, separate from Scotland, "for ever, *et regali dignitati et corone ac regno Angliæ perpetuis temporibus annexa, unila, et incorporata*." In the tenth year of his reign he granted to Berwick an exemplification and confirmation of the charter of Edward I.*

Berwick was again lost when Edward the Third was in France; and retaken after his return; and, in the thirtieth year of his reign, he granted a new charter, confirming the former, with some additions; particularly, that they should be governed by the laws and usages which they had enjoyed in the time of Alexander late king of Scotland.

Berwick was again lost; and again recovered by Edward the Fourth, who confirmed the former charters, by charter† and act of parliament‡.

Between this time and the 33 of Hen. VIII. (particular time does not appear, because the returns are lost), Berwick was summoned, as a borough of England, to send members to parliament. They did so till the Union; and they still continue to send members to the parliament of Great Britain, *by summons*, as being parcel of the realm; not under any of their charters; none of which give them such a right. That of Edward the Fourth is an *insuperimus* of the preceding ones, and the charters of 19 April, 1 H. VIII.—25 April, 1 Qu. Mary.—4 May, 1 Eliz. are confirmatory charters only; none of which give them a right to send members to parliament; and yet they have sent them ever since the time of Henry the Eighth.

Their present constitution is under letters patent, granted by James the First§, which are expressly confirmed by act of parliament||: under these they act; and have had no charter since.

Before the union, Berwick, as well as Wales, was bound by every English *general* act of parliament, as being part of the realm of England. Where it is particularly named in acts of parliament, it is superfluous: so is the mention of Wales. If it was not part of England before the union, it is now no part of Great Britain; for only England and Scotland are united. It is bound by all general laws since the union.

In *general* acts, not applicable to Scotland, and where Scotland is not intended to be included, the method is, *by provision*, to declare that the act does not extend to Scotland. Where provisions are made for that part of Great Britain called England, Wales and Berwick-upon-Tweed are comprehended under that description.

Wales, from the time it first came into the hands of Edward the First, was deemed to be within the realm, upon the doctrine of having been holden before of his crown; and in consequence of such tenure, by rational deductions from the principles of our common law, this court exercises jurisdiction over matters in Wales, and which is not given by any act of parliament.

Scotland was considered in the same light. This court exercised sovereign

* 6, 7, 8, Ed. 3. Rymer vol. 4. pa. 536. 590 to 595. 614.

† 22 Ed. 4.

‡ 22 Ed. 4. c. 8.

§ 20 April, 2 J. 1.

|| 2 J. 1. c. 28. called in Hawkins's

edition 1 J. 1. c. 28.

jurisdiction over it, as well before it came into the king's hands as afterwards. The chance of war refuted the claim of the rest of Scotland, as belonging to England; and confirmed it as to Berwick.

But if Berwick were to be deemed a dominion of the crown, and no part of the realm of England, it may nevertheless be under the controul, and subject to the superintendence of the king, in this court.

The constitution given to Berwick by the crown of England, approved by parliament, shews it necessarily is so; much stronger than in the case of counties palatine, or Wales. The people of Berwick have not *jura regalia*, or a complete jurisdiction within themselves, like a county palatine. They have no sovereign courts of the king, within themselves, like Wales. They are made a free borough, to hold in burgage, by rent. Such a creature of the law must of necessity be connected, as part of a kingdom, and subordinate.

In the time of king Alexander, they were subject to the supreme court of Scotland. They could have no laws or customs, but such as were suitable to the subordinate condition of a borough.

The metamorphosis from a Scotch to an English borough, did not render them independent; it only changed the sovereign jurisdiction. They are made a corporation in England; to sue or be sued in that capacity in England; to take lands in that capacity in England. The burgesses, in that capacity, are to enjoy many privileges in England; they send representatives to parliament, *by summons*, as a borough in England.

This court *alone* can judge of their franchises, as a corporation; who are entitled as members of it; what are their privileges; and whether they continue to exist or not. As if you suppose a question to arise "whether they are dissolved;" or "who is mayor;" who can judge but this court? The charter of James supposes it, because he commands the attorney and solicitor general to bring no writ of *quo warranto* for things past. In Hilary Term, 14, 15, Car. 2. a *quo warranto* was brought in this court against the mayor, bailiffs, and burgesses of Berwick, but not proceeded in.

Another part of their constitution, more immediately applicable to the present question, is what relates to pleas of the crown.

The charter grants them a court leet, agreeable to the laws and statutes of England; a commission of peace and *oyer and terminer*, with the same authority which belongs, or may belong, to justices of the peace in England, and to hear and determine in like manner as justices of peace, by the laws and statutes of England. It grants them a commission of goal-delivery, under which they must proceed by indictment, according to the course of the law of England; as in fact they always have done.

The charter gives them power to make ordinances with penalties, so as the penalties be reasonable, and not repugnant to the laws of England. In short they have no criminal law, but the law of England; and no criminal jurisdiction but with such a reference to the law of England, as of necessity includes this court.

Suppose they should adjudge a man to death; for a crime not capital by the law of England—suppose they should indict a man for disobeying an ordinance repugnant to the law of England—suppose they should indict a man for treason, though the fact would not amount to treason within our laws—suppose, as

justices of the peace, they should issue illegal orders, without any authority, in a summary way, there can be no redress but here; and if this court could not interpose, they would, under the grant of a limited, subordinate authority, be, in every sense of the word, absolute.

Another objection is, "the king's writ does not run there."

That is applicable only to the writ of *venire*, and other jury process; or perhaps, to ORIGINAL writs, which are the commencement of suits between party and party.

When this court removes, by writ of *certiorari*, an indictment for a misdemeanour from Wales, the Welsh sheriff is commanded to cause the defendant to appear; and when he has appeared, and issue is joined, there is a suggestion, "that the king's writ does not run into Wales." So the very record which says the "king's writ does not run," shews many that do.

The reason why a *venire* does not run to Berwick, is, because they are exempted from being summoned out of the borough to serve upon juries.

But the charter supposes that other writs, ministerially directed, may run: because the return of all writs, precepts, and process issuing out of the king's courts, and the execution thereof, is granted to the mayor, bailiffs, and burghesses, exclusive of any sheriff, minister, or bailiffs.

Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the king) such as *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, are not restrained by any clause in the constitution given to Berwick. Upon a proper case, they may issue to every dominion of the crown of England.

There is no doubt as to the power of this court, where the place is under the subjection of the crown of England: the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the throne of England, this court has no power to send any writ of any kind. We cannot send a *habeas corpus* to Scotland, or to the Electorate; but to Ireland, the Isle of Man, and the plantations, to Guernsey and Jersey, we may; and formerly it lay to Calais, which was a conquest, and ceded to the crown of England by the treaty of Bretigny.

But notwithstanding the power which the court has, yet where it cannot judge of the cause, or give relief, it will not interpose. Therefore upon imprisonments in Guernsey and Jersey, in Minorca, and in the plantations, I have known complaints to the king in council, and orders to bail or discharge. But I do not remember an application for a writ of *habeas corpus*. Yet cases have formerly happened of persons illegally sent from hence, and detained there, where a writ of *habeas corpus*, out of this court, would have been the most proper and effectual remedy.

In Cro. Jac. 543. a precedent is cited of a *habeas corpus* to Berwick. I have caused the records to be searched for that case: and the orders of the court and return to the writ of *habeas corpus* are found. The court had fined the mayor and bailiffs of Berwick 2000l. for not returning the writ: they had also issued an *alias habeas corpus*. The *alias habeas corpus* not being returned, they ordered the fine to be estreated, and that a *pluries habeas corpus* should issue *sub poena* 500 merc returnable immediately. At the same time they issued an

attachment against the mayor and bailiffs; and ordered the Governor of the county to execute it. The next day the estreat of the fine was suspended, on the mayor being discharged out of prison, and bailed to appear, on the octave of Hilary, being the return of the attachment against the mayor and bailiffs.

Hilary Term they are ordered to return the *pluries habeas corpus*. After the mayor and two of the bailiffs were committed, and examined upon interrogatories, as in contempt; and two of them were ordered to find bail at the suit of the applicant, before they were discharged.

The return states the charter of Edward III. and that by their laws and customs, the Guild had authority to punish for colouring foreigners goods, or in partnership with a foreigner, by fine, imprisonment, and disfranchising. It states that Henry Brearly (the party) was found guilty of being in partnership with a foreigner, and fined 100l. which he not only refused to pay, but added to them with scandalous and contumelious reproaches; that they therefore committed him to prison till the fine should be paid, and disfranchised

him. There is an order the same Hilary Term, stated to be upon the recommendation of the court, (therefore I suppose by consent,) that "the fine of 100l. set against Brearly by the Guild, should be reduced to 50l. and that upon his submission he should be restored to his freedom." But he was to remain disfranchised till he should make his submission.

As to the other prerogative writ of prohibition, it was taken for granted, in 1. Abr. 292. "that a prohibition lay out of this court to the consistory of Berwick, in a matter arising in Berwick;" though the suggestion "that the writ lay out of which the tithes were claimed lay in Scotland and not in Berwick," was held insufficient. How Berwick came to be part of the diocese of Durham, I have not yet learned.

As to writs of *mandamus*. In Trin. 9 Geo. I. a *mandamus* issued, to admit and swear four persons elected to be churchwardens of Berwick.

In 11 Geo. I. c. 4. proceeds upon the ground "that a writ of *mandamus*, out of this court, lies to Berwick."

The last sort of writ, not ministerially directed, is a *certiorari*.

The *certiorari*, for a proper purpose, lies to any dominion of the crown of England.

Mr. Justice Doderidge, in Sir John Carew's case, says, "the Register makes mention of a *certiorari* to remove a record taken at Calais *."

And there are precedents of such writs to Berwick directly. In Pasch. c. 2. an indictment for a riot was removed from Berwick by *certiorari*; and was issued upon it out of this court, against the defendants to appear. In Michaelmas Term following the indictment was quashed, and the town clerk of Berwick amerced 5l. for not returning the caption.

In Trinity Vacation 1754, two indictments were removed from Berwick by *certiorari*. The defendants appeared in this court, and pleaded not guilty.

There is no instance of a doubt ever having been made, before the present time, concerning the authority of this court to send a writ of *certiorari* to Berwick; and we are all clearly of opinion, "that the court, by law, has such power."

* V. Cro. Jac. 484.

Two great authorities are urged in opposition to this. They are no less than those of Sir Edward Coke and Lord Chief Justice Hale.

Sir Edward Coke, in Calvin's case*, says, "that Berwick is no part of England, nor governed by the laws of England." And Lord Chief Justice Hale follows him, and says, "Berwick was sometimes parcel of Scotland, but was won by conquest by king Edward I. and after that lost by king Edward II. and afterwards regained by Edward III. It was governed by the laws of Scotland and their own particular customs, and not according to the rules of the law of England; further than as by custom it is there admitted. Yet now," says he, "by CHARTER they send burgesses to the parliament of England." In Calvin's case, there was no question concerning the constitution of Berwick. And we plainly see, by what has passed in the present case, how little was known, even at Berwick itself, concerning its own constitution. What was said about it in Calvin's case, was a mere *obiter* opinion, thrown out by way of argument and example. Sir Edward Coke was very fond of multiplying precedents and authorities; and, in order to illustrate his subject, was apt, besides such authorities as were strictly applicable, to cite other cases which were not applicable to the particular question under his consideration. In the case then under judicial consideration, the question was, "whether Robert Calvin, the plaintiff, born in Scotland, after the descent of the crown of England to King James the First, was an alien born, and consequently disabled to bring any real or personal action, for any lands, within the realm of England." But it never was a doubt, "whether a person, born in the conquered dominions of a country, is subject to the king of the conquering country:" and therefore the argument did not hold from the case of Berwick, to the point then in question. Neither was the case of Calais in any sort apposite.

As to the laws by which Berwick is governed.

Whatever may be the case, when more particularly inquired into, with regard to their civil constitution, it appears very sufficiently, that in pleas of the crown, Berwick has no other laws, by which it is governed, but the laws of England. The statute 11 Geo. II. c. 19. for the more effectual securing the payment of rents and preventing fraud by tenants, supposes this. All the provisions of that act are extended to Berwick by name. Some of these provisions relate to ejectments, which concern civil matters; and they do proceed there by ejectment. But it is manifest that Coke is mistaken in saying, generally, "that Berwick was not governed by the laws of England." For in criminal matters, the fact is clearly otherwise.

And Lord Chief Justice Hale is clearly mistaken in saying, "that Berwick sends members to the parliament of England by charter." For it is by writ or summons that they send them thither, in consequence of their being a borough. Chester, both county and city, first sent members to parliament, by virtue of an act made in Henry the VIIIth's time†.

But though the court has power, by law, to send a writ of *certiorari* to Berwick, yet it ought not to issue in vain. And therefore we should be satisfied, that the end for which it is prayed, be attainable; and the ground sufficient for removing the record, in order to attain that end. The end here avowed is, that the

* 7 Co. 23 b.

† 34 H. 8. c. 13.

matter may be tried in this court. And it is objected that there can be no such trial, because the trial must be local, and no jury can come from Berwick.

But the law is clear and uniform, as far back as it can be traced. Where the court has jurisdiction of the matter, if from any cause, it cannot be tried in the place, it shall be tried as near as may be. All local matters arising in Wales triable in this court, are by the common law tried by a jury of the next county in England*. So as to the Cinque Ports, the *venire facias* shall be awarded *de vicineto* of the next vill, either in the county of Kent or Sussex†. So as to the Isle of Ely‡. So as to Ireland§; a *venire* was directed to the sheriff of Salop, as the next English county. So in parts of England itself, where an impartial trial cannot be had in the proper county, it shall be tried in the next.

This is the ancient and general rule, wherever the court has jurisdiction; and this general rule has often been applied to Berwick.

Edward the First, by an ordinance in parliament, extended these rules, as to complaints against the king of Scotland, that they might be tried in this court by a jury of Northumberland, or any other county, or before commissioners appointed by the king||. There was a precedent applying this rule to Berwick, in 42 Eliz. affirmed upon a writ of error; and the like in 44 Eliz. The like the 20 Car. II. *Crispe and Jackson v. Mayor and Burgesses of Berwick*¶. And the Mayor of Berwick's case lays down as a certain principle, that where a local matter arising at Berwick is tried here, there is to be a suggestion made on the roll, "*breve domini regis ibi non currit*," as it is in Wales.

There are two precedents in the reign of James II. of informations in this court for misdemeanours in Berwick, and in Michaelmas 8 Ann. the Attorney-General filed an information here, for misdemeanours in Berwick. In Hilary and Easter 1755, this court, after much litigation, granted informations for bribery in Berwick, at the election of their members to parliament, as being an offence and misdemeanour at the common law. Which shews Berwick, in respect of the jurisdiction of this court, "to proceed originally by information for misdemeanours committed there," to be upon the same foot as any other part of England. And the court never would have granted those informations without being satisfied that they might be tried; because a defect of power to try, necessarily infers a want of jurisdiction.

There is not one authority to the contrary. And in reason it would be most absurd; because it would really be putting the place out of the protection of the law, and there must, in many important cases, be a total failure of trial, and consequently of justice.

Suppose the office of mayor should be usurped; the usurpation is a crime, and cannot be tried before the man himself who is accused, or any jurisdiction in the town. Much less could a question "whether the corporation was dissolved" be tried before themselves. Such questions could not be tried originally before commissioners sent thither by the king; they could only be judged in this court. To try franchises of this kind in any other shape, would not only

* 19 H. 6. fo. 12. b. pl. 31.

† 2 Ro. Abr. tit. Trial, Letter I. pl. 6, 7.

pa. 596, 597.

‡ *Howse v. Bishop of Ely*, Moore 88.

§ 2 Ro. Abr. 597. pl. 8.

|| 21 Ed. 1. Ryley's Placita Parl. 159.

¶ 1 Lev. 252. 1 Mod. 36, 37. 1 Sid.

381. 462. 1 Vent. 58. 90. Raym. 173.

1 Keb. 414. 676.

Touching the islands of Jersey (*a*), Guernsey (*b*), Sark, and Alderney, they were anciently a part of the Duchy of Normandy; and in that right, the kings of England held them till the time of king John. But although king John, as is before shewn, was unjustly deprived of that duchy, yet he kept the islands; and when, after that, they were by force taken from him, he by the like force regained them: and they have ever since continued in the possession of the crown of England (*E*).

be contrary to the common law, but to the act * abolishing the Star Chamber, and all the statutes there recited.

Suppose an action between the corporation and there own lessee to be depending at Berwick, or any suit instituted there between the corporation and any other person on a point of property, they could not judge in their own cause; and if it could not be tried elsewhere, there must be a failure of justice.

Every rule of the common law which holds in the case of Wales, concludes *fortiori* to Berwick, both as to the jurisdiction of this court, and the method of trial. Berwick is only a borough. It has neither *jura regalia* nor superior courts. Wales had both. A small part of the county of Durham is nearer to Berwick, than Northumberland. But at the time of first sending process to the latter, the king's writ did not run to the former, being a county palatine. So that Northumberland was the nearest English county for the purpose of trial, as the king's writ did not run to Durham. The objection made when this matter first came on, appears now to be groundless, "that they proceeded by laws and usages of which this court cannot judge." Whereas their trials, as to criminal matters at least, are in the course of the common law, and entirely governed by the laws of England †.

* 16, 17, Car. 1. c. 10.

and note (i) on cap. xii. of that work, ed. oct. 1775.

† For ancient authorities as to the question in general, see Fortescue *De Laudibus*,

(*a*) Jersey or Gearsey, *olim Casarea*. (*b*) Or Garnsey, *olim Servia*, 4 Inst. 4 Inst. 286. Blac. Com. 1 v. 106. 286.

(*E*) King John constituted—12 coronatores ad placita et jura coronæ conservanda, et concessit quod ballivus per visum coronator' placitare sine brevi poterit de assisa novæ disseisinæ, de morte antecessor', et de dote, infra annum. 4 Inst. 286. App. H. Jer. N. 1.

The 12 coroners are elected by the country upon death, and sworn, and ought with the justices, or (if they are absent) by themselves, judicare de omnibus casibus in insulâ emergent', (exceptis nimis arduis, as high treason, &c.) amerciamenta, taxare, &c.

Placitum in insula coram aliquibus just.' inceptum non debet extra insulam adjornari.

Nullus de tenemento quod per annum et diem quiete tenuit, sine brevi de cancel' respondere teneatur.

Nullus debet imprisonari in castro, nisi in causâ criminali, et hoc per judicium coronator' jurat.'

As to their laws, they are not governed by the laws of England, but by the laws and customs of Normandy: but not as they are at this day: for since the actual division and separation of those islands from that duchy, there have been several new edicts and laws made by the kings of France, which have much altered the old law of Normandy: which edicts and laws bind not in those islands, they having been ever since king John's time at least, under the actual allegiance of England.

And hence it is, that though there be late collections of the laws and customs of Normandy, as Terrier and some others, yet they are not of any authority in those islands, for the decision of controversies; as the *Grand Coutumier* of Normandy is: which is, at least in the greatest part thereof, a collection of the laws of Normandy, as they stood before the disjoining of those islands from the duchy; viz. before the time of king Henry III. though there be in that collection some edicts of the kings of France which were made after that disjunction. And those laws, as I have shewn before, though in some things they agree with the laws of England, yet in many things they differ, and in some are absolutely repugnant (a).

And hence it is, that regularly, suits arising in those islands are NOT to be tried, or determined, in the king's courts in England; but are to be heard, tried, and determined in those islands;—either before the ordinary courts of jurats there, or by the justices itinerant there (b), commissioned under the great seal of England to determine matters there arising. The reason is, because their course of proceedings, and their laws, differ from the course of proceedings and the laws of England.

And although it be true, that in ancient times, since the loss of Normandy, some scattering instances are, of pleas moved here, touching things done in those islands; yet the general settled rule has been, to remit them to those islands, to be tried and determined there by their law. Though at this day, the courts at Westminster, hold plea of all TRANSITORY actions, wheresoever they arise; for it cannot appear upon the record, where they did arise.

Mic. 42 E. 2. Rot. 45. *coram rege*. A great complaint was

(a) The Grand Coutumier is certainly a book of great antiquity and authority. See however Hal. View, ch. 2. part I.—and ante c. 6.

(b) All causes are originally determined by their own officers, the bailiffs and jurats of the islands.

made by petition, against the deputy governor of those islands, for divers oppressions and wrongs done there. This petition was, by the chancellor, delivered into the court of *B. R.* to proceed upon it; whereupon there were pleadings on both sides. But because it appeared to be for things done and transacted IN the said islands, judgment was thus given: “*Et quia negotium prædict’ in curia hic terminari non potest, eo quod juratores insulæ prædict’ coram justitiariis hic venire non possunt, nec de jure debent, nec aliqua negotia infra insula prædicta emergentia terminari non debent nisi secundum consuet. insulæ prædictæ: Ideo recordum retro traditur cancellario ut inde fiat commissio domini regis ad negotia prædicta in insula prædicta audienda & terminanda secundum consuet’ insula prædictæ.*”

And accordingly 14 *Junii*, 1565, upon a report from the attorney-general, and advice with the two chief justices, a general direction was given by the queen and her council,—that all suits between the islanders, or wherein one party was an islander, for matters arising within the islands, should be THERE heard and determined (*a*).

But still this is to be taken with this distinction and limitation; viz. that where the suit is immediately for the king, there the king may make his suit in any of the courts HERE, especially in the court of king’s bench. For instance, in a *quare impedit* brought by the king in *B. R.* HERE, for a church IN those islands. So in a *quo warranto* for liberties there. So a demand of redemption of lands, sold by the king’s tenant within a year and a day, according to the custom of Normandy. So in an information for a riot; or grand contempt against a governor deputed by the king. These, and the like suits, have been maintained *by the king* in his court of king’s bench HERE, though for matters arising WITHIN those islands. This appears *Pascha* 16 *Edw. II. coram rege*, *Rot.* 82. *Mich.* 18. *Edw. II. Rot.* 123, 124, 125. & *1st 1 E. III. Rot.* 59.

And for the same reason it is, that a writ of *habeas corpus* lies into those islands, for one imprisoned there: for THE KING MAY DEMAND, AND MUST HAVE AN ACCOUNT OF THE CAUSE OF ANY OF HIS SUBJECTS LOSS OF LIBERTY: and therefore a return

(*a*) The king’s writ, or process, from the courts of Westminster—(*brevia mandatoria* excepted) is there of no force; but his commission is.—They are not bound by common acts of our parliament, unless particularly named. 4 *Inst.* 286.

MUST be made of this writ, to give the court an account of the cause of imprisonment; for no liberty, whether of a county palatine, or other, holds place against those *brevia mandatoria*: as that great instance of punishing the bishop of Durham, for refusing to execute a writ of *habeas corpus* out of the king's bench, 33 Edw. I. makes evident.

And as pleas arising in the islands regularly, ought NOT, in the first instance, to be deduced into the courts here, except in the king's case; so neither ought they to be deduced into the king's courts HERE, in the SECOND instance. And therefore, if a sentence or judgment be given in the islands, the party grieved thereby may have his appeal TO THE KING AND HIS COUNCIL, to reverse the same, if there be cause (a). And this was the course of relief in the duchy of Normandy, viz. by appeal to the duke and his council. And in the same manner, it is still observed in the case of erroneous decrees or sentences in those islands, viz. to appeal to the king and his council.

But the errors in such decrees or sentences are not examined by writ of error in the king's bench, for these reasons:

First, because the courts there, and those here, go not by the SAME rule, method, or order of law.

And secondly, because those islands, though they are parcel of the dominion of the crown of England, yet they are not parcel of the realm of England, nor indeed ever were (b); but were anciently parcel of the duchy of Normandy; and are those remains thereof, which the power of the crown and kingdom of France have not been able to wrest from the kings of England (c).

(a) For, if an erroneous judgment be given there, a writ of error lies not here. Jenk. 199. pl. 15. who cites 2 E. III. 25. 11 H. VI. 5. Jenkins, after his report of the case, adds—"By all the judges of England, and the king's counsel."

"Nil temere novandum.

"Fiat quod prius fieri consuevit."

(b) In Calvin's case, 7 Co. 21. a. it is said, that these islands are not parcel of the realm of England. It seems that they were not so originally. Cont. Seld. de Ma. Cl. 4 v. 1351. Acc. App. H. Jer. 440.

(c) As to our colonies, or plantations, the student may consult the first

volume of Blackstone's Commentaries, and Mr. Lind's "Remarks on the principal Acts of the thirteenth Parliament of Great Britain"—an ingenious performance, though the principles are somewhat novel. On the other hand, see Mr. Burke's Speech of the 19th of April 1774, and that of the 22d of March 1775. Since which period, namely, on the 13th of November 1782, his Majesty acknowledged the former colonies of New Hampshire, Massachusetts's Bay, Rhode Island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia,

to be free, sovereign, and independent States, and treated with them as such. They are called the United States of America. See Ann. Reg. for 1782, and Stat. 22 Geo. III. c. 46. For the history of that important revolution, see Ann. Reg. from 1774 to 1783. As to any foreign dominions which may belong to the person of the king by hereditary descent—by purchase, or other acquisition, as the territory of

Hanover, and his Majesty's other property in Germany—suffice it to remark, that such dominions do not in any wise appertain to the crown of these kingdoms;—they are therefore entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. See the act of settlement, 12 & 13 W. III. c. 3. and Blac. Com. 1 v. 109.

CHAP. X.

Concerning the communication of the laws of England unto the kingdom of Scotland.

BECAUSE this inquiry will be of use, not only in itself, but also as a parallel discovery of the transmission of the English laws into Scotland, as before is shewn they were into Normandy, I shall in this chapter pursue and solve their several queries, viz.

First, what laws of Scotland hold a congruity and suitableness with those of England.

Secondly, whether these be a sufficient ground for us to suppose, that that similitude or congruity began with a conformation of **THEIR** laws to those of England. And,

Thirdly, what might be reasonably judged to be the **MEANS**, or **REASON**, of the conformation of their laws unto the laws of England.

As to the first of these inquiries. It is plain, beyond all contradiction, that many of the laws of Scotland hold a congruity and similitude, and **MANY** of them a **PERFECT IDENTITY**, with the laws of England; at least as the English laws stood in the times of Henry II. Richard I. king John, Henry III. and Edward I. And although in Scotland, use hath always been made of the **CIVIL LAW**, in point of direction, or guidance, where their municipal laws, either customary or parliamentary, failed; yet, as to their particular municipal laws, we shall find a **RESEMBLANCE**, **PARITY**, AND **IDENTITY**, in their laws with the laws of England, anciently in use (a). We need go no further for evidence hereof, than the *Regiam Majestatem* (b), a book published by Mr. Skeen

(a) The law of Scotland (says Barington) agreed anciently not only with the principles of the law of England, but in its practice, tho' there might be some variances—of no great importance. Obs. on Stat. 111. Blackstone admits “a great resemblance;”—yet

seems to question “an identity” in their laws, on the accession of James the Sixth to the crown of England. Com. 1 v. 95.

(b) The book is so called, because (according to Sir Edward Coke) “it beginneth (as Justinian’s Institutes do)

in Scotland. It would be too long to instance in all the points that might be produced; and therefore I shall single out some few, remitting the reader for his further satisfaction to the book itself (A).

with these words—*Regiam Majestatem*.”—4 Inst. 345. The Institutes of Justinian begin—“*de usu armorum et legum*”—and then proceed, *IMPERATORIAM Majestatem non solum armis decoratam, &c.*

(A) It is well known, says Mr. Barrington, that the preface and introduction to the *Regiam Majestatem*, as well as many other parts of that ancient book of the Scotch law, are the same with our Glanvil: and though formerly there were wars and great animosities between the two nations, yet, from their vicinity, there was, to a certain degree, a communication of customs and manners. The learned Craig supposes, that the English law is, in some particulars, the foundation of that of Scotland, and that the *Regiam Majestatem* is a mere transcript from our Glanvil; other writers upon the Scotch law, particularly Bruce*, have denied this, asserting that the English is derived from the Scotch: be this as it may, the very point in litigation necessarily supposes an agreement and connexion.

As for the opinion of English writers upon this head, (continues Mr. Barrington) I have not happened to meet with one, who seems ever to have looked into the Scotch law, any further than to have compared Glanvil and the *Regiam Majestatem* †; it is also very particular, that even in Calvin's case ‡, when the judges might have paid their court so well to James the First, by shewing an affinity between the two laws, there is not even an allusion to such an agreement. This is the more extraordinary, as this king, in one of his speeches to the parliament, says, “all the law of Scotland for tenures, wards, liveries, and seignories, is drawn from England; and James the First of Scotland, being educated in England, brought the English laws in a written hand §.”

The *Regiam Majestatem*, though in most particulars the same with Glanvil, is considered as authentic by Sir Edward Coke, and by most of the writers upon the Scotch law, except Craig, whose opinion Macdoul strongly combats. By a Scotch statute of the year 1425, “it is statute and ordained, that six wise men, and discreet (qhuilk knawes the lawes best) sall be chosen to see and examine the buikes of the lawe, that is to saye, *Regiam Majestatem et Quoniam Attachiamenta*, and mende the lawes that neids mendment.” These books therefore, were at that time, considered as the very foundation of the Scotch law,

* “Non prætereundum, virum clarissimum (sc. Craigium) (quod in epistola nuncupatoriâ, et sexcentis aliis in locis aperte professus est) dum regnorum Scotiæ et Angliæ adunationi vellicatur, cum in finem probare admittitur, maxime inter se affinitatem habere utriusque gentis jura, in eo præcipue operam potuisse suam, ut ab Anglorum principum placitis, istiusque gentis consuetudinibus,

“mores patrios haud minimâ ex parte defluxisse demonstret. Sed quid (malum) nobis cum antiquis invidisque hostibus.” Bruce's Princip. Jur. Feud. Edinb. 1713. in scopo.

† See Lord Bacon, vol. 2. Whitelock's Comm. on the Parl. Writ, vol. 2. p. 272. Reliq. Spelm. p. 72. 4 Inst. cap. 75.

‡ 7 Cok. Rep. p. 1.

§ Bar. pref. 5. on Stat. 3.

Dower of the wife, to be the THIRD part of her husband's lands of inheritance; the writ to recover the same; the means of which a sort of transcript from the law of another nation could not have been allowed to be, by the Scotch parliament*.

Sir Edward Coke, observing the many circumstances in which the two nations agreed, supposes the common law of each to have been originally the same; especially as the *Regiam Majestatem*, which contains the rules of the ancient common law of Scotland, in substance agrees with Glanville, whose book contains the principles of our common law, as it stood in the time of Henry the Second.—“The book (says Coke) doth in substance agree with our Glanville, and most commonly *de verbo in verbum*, and many times our Glanville is cited therein by special name. But by reason of their acts of parliament, which in many points have altered, diminished, and abrogated many of the old, and made new laws and other proceedings, the distinct kingdoms as they now stand, have many different laws†.” Mr. Justice Blackstone, pursuing the same idea, remarks, that “the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments‡.”

Sir Edward Coke recommends it to those who are desirous of knowing such *miscellanea* as he has observed concerning Scotland, to read the records and authorities following.”

The records of parliament from the beginning thereof, for the receivers and triers of petitions in the lords house. Rot. liberat. anno 3 Ed. 1. m. 2. per Johannem Lovetot. Rot. paten. anno 20 Ed. 1. Gilberto comiti Glovernie et Hereford. Scotia, Rot. parliament. 21 Ed. 1. inter placita Rot. 1 and 2. Hoveden, 1194. p. 7. Carta regis R. 1. Mat. Westm. anno Dom. 1260. p. 302. H. 3. Rot. Scotiæ 21 Ed. 1. Carta E. 1. et literæ Alexand. regis Scotiæ. Rot. Vasconiz 25 E. 1. m. 2, 3. in dors. Trin. 25 E. 1. coram rege Rot. 6. Norff. Rafe de Tonyes case. Anno 29 E. 1. literæ quas rex per se et quas comites et barones Angliæ per se miserunt domino papæ anno 29 E. 1. autoritate parliamenti, qua irrotulata sunt etiam in Scaccario§. Vide Walsingham, 48 and 49.

Rot. pat. 24 E. 1. Episcopis Scotiæ, Mich. 33 E. 1. coram rege Rot. 127. Scotia, Rot. parl. 35 E. 1. in brevi de parlamento, et auter 1 E. 2. 1 E. 3. fo. 17. Graye's case. 6 E. 3. 18. The Abbot of Crowland's case. 9 E. 3. 6. John Darcey's case. Rot. pat. 10 E. 3. 2 pars. Comes Arundel. Rot. parl. 14 E. 3. nu. 15. stat. 4. Rot. claus. 22 E. 3. et 23 E. 3. breve de parlamento magnifico principi, &c. 22 Ass. p. 85. 39 E. 3. fo. 35. Rot. parliament. 42 E. 3 nu. 7. 42 E. 3. fo. 25. 8 R. 2. tit. Cont. clayme. p. 8. ultimo. 13 H. 4. fo. 5. Rot. pat. 2 H. 5. part 3. m. 1. 8 H. 5. fo. 5. 32 H. 6. 25. 20 E. 4. 6. b. Litt. sect. 100 and 165. 1 Part of the Institutes. Stat. de 2 and 3 E. 6. cap. 36. Fortescue cap. 13. Pl. Com. 126. Dier manuscript 3 Eliz. 22. b. and 18 Eliz. fo. 68. m. 5. Dier 12 Eliz. fo. 287. in print. Lib. 7. fo. 22, 23, &c. Calvin's

* Bar. on Stat. 17.

† 4 Inst. 345, 346.

‡ Com. 1 v. 95.

§ Rot. Parl. apud Linc. 29 E. 1. An. Dom. 1300. Literæ omnium nobilium Angliæ, &c. Papæ.

forfeiting thereof, by treason or felony of the husband, or adultery of the wife; are in great measure conformable to the laws of England. Vide *Regiam Majestatem*, lib. 2. cap. 16, 17. and *Quoniam Attachiamiento* (a), cap. 85.

The exclusion of the descent to the ELDER brother, by his receiving homage; which, though now antiquated in England, was anciently received here for law; as appears by Glanville, lib. 7. cap. 1. and vide *Regiam Majestatem*, lib. 2. cap. 22.

The exclusion of daughters from inheritances, by a son. The descent to all the daughters in coparcenary, for want of sons. The chief house allotted to the eldest daughter upon this partition. The descent to the collateral heirs, for want of lineal, &c. Ibid. cap. 24, 25, 26, 27, 28. 33, 34. But this is now altered in some things per stat. Rob. cap. 3.

The full ages of males 21, of females 14, to be out of ward in socage 16. Ibid. cap. 42.

That the custody of ideots belonged to the king. Ibid. cap. 46.

The custody of heirs in socage belong to the next of kin, to whom the inheritance can't descend. Vide *Regiam Majestatem*, cap. 47.

The son born BEFORE marriage, or *bastard eigne*, not to be legitimate by the marriage after; nor was he hereditary by the ancient laws of Scotland, though afterwards altered in use, as it seems. *Regiam Majestatem*, cap. 51.

The confiscation of *bona usurariorum*, after their death, conform to the old law here used. Ibid. cap. 54. though now antiquated.

The laws of escheats, for want of heirs, or upon attainder. Ibid. cap. 55.

(a) This book, which is an ancient (says Sir Edward Coke) it beginneth book in the Scotch law, is entitled, with those two words." 4 Inst. 345. *Quoniam Attachiamiento*, " because

case. Lib. 9. fo. 114. Seignior Zaucher's case. 4 Inst. in the chapter of the High Court of Parliament.

Polydor Vergil. Hollinsb. 1 part. fo. 116, 117. 2 part 286. Stowe 303. Math. Westm. 425, 428, 443. Walsingham 17, 28, 32, 129, &c.

Those who are desirous of gratifying a minute inquiry into the municipal laws of Scotland, may consult Mr. Wallace's System of the Principles of the Laws of that Country, a work of uncommon labour and research.

The acquittal of lands given in frank-marriage, till the fourth degree be past. *Ibid.* cap. 57.

Homage, the manner of making it with the persons, by, or to whom, as in England. *Ibid.* cap. 61, 62, 63, &c.

The relief of an heir in knight's service, of full age. *Regiam Majestatem*, cap. 17.

The preference of the sister of the WHOLE blood, before the sister of the HALF blood. *Quoniam Attachiamento*, cap. 89.

The single value of the marriage, and forfeiture of the double value, precisely agree with the statute of Marlbridge. *Ibid.* cap. 91.

The forfeiture of the lord's disparaging his ward in marriage, agrees with *Magna Charta*, and the statute of Marlbridge. *Quoniam Attachiamento*, cap. 92.

The preference of the lord, by priority, to the custody of the ward. *Ibid.* cap. 95.

The punishment of the ravisher of a ward, by two years imprisonment, &c. as here. *Ibid.* cap. 90.

The jurisdiction of the lord in *Infangtheof*. *Ibid.* cap. 100.

Goods confiscate, and deodands, as here. *Liber De Modo tenendi Cur. Baron.* cap. 62, 63, 64.

And the like of waifs. *Ibid.* cap. 65.

Widows not to marry without the consent of the lord. *Statute Mesei.* 2. cap. 23.

Wreck of the sea defined precisely as in the stat. Westm. 2. *Vide ibid.* cap. 25.

The division of the deceased's GOODS,—one third to the wife, another third to the children, and another to the executor, &c. conformable to the ANCIENT law of England, and the custom of the North to this day. *Lib.* 2. cap. 37.

Also the proceedings to recover possessions by *mortd'ancestor*, *juris utrum*,⁴ *assize de novel disseisin*, &c. the writs and process are much the same with those in England, and are directed according to Glanville, and the old statutes in the time of Edward I. and Henry III. *Vide Regiam Majestat.* lib. 3. cap. 27 to 36.

Many more instances might be given, of many of the municipal laws of Scotland, either precisely the same with those in England, or very near, and like to them (a): tho' it is true, they

(a) It seems from the *Regiam Majestatem*, that the trial by jury was, in civil matters, used in Scotland so early as David I. who began to reign in 1124. —“When the twelve royal men compeer and pass upon the assize, they

have some particular laws, that hold not that conformity to ours, which were introduced either by particular, or common customs, or by acts of their parliaments. But by what has been said and instanced in, it appears, that like as between the laws of England and Normandy, so also between the laws of England and Scotland, there was ANCIENTLY a great similitude and likeness.

I come therefore to the second thing I proposed to enquire into, viz.—what evidence there is, that those laws of Scotland, were either *desumed* from the English laws; or, from England, transmitted thither in such a manner, as that the laws HERE in England, were, as it were, THE ORIGINAL OR PRIME EXEMPLAR, out of which those parallel, or similar laws of Scotland, were copied or transcribed, into the body of their laws. And this appears evident on the following reasons, viz.

First, for that Glanville, which, as has been observed, is the ancientest collection we have of English laws (a), seems to be even transcribed, in many entire *capita* of the laws above-mentioned; and in some others, where Glanville doubts, that book doubts: and where Glanville follows the practice of the laws then in use, though altered in succeeding time, at least after the reign of Edward I. there the *Regiam Majestatem* does accordingly. For instance, viz.

Glanville, lib. 7. cap. 1. determines that a man can't give away part of the lands which he held by hereditary descent, unto his bastard, WITHOUT THE CONSENT OF HIS HEIR; and that he may not give ALL his purchases from his eldest son. This is also declared to be the law of Scotland accordingly, *Regiam Majestatem*,

shall proceed and try quhilk of the parties, the persewer or the defendant, hath best right to the londs claimed."—This is cited from Skene's translation of the *Regiam Majestatem*. But see Reg. Maj. l. 1. c. 12, 13, 14. l. 2. c. 19. 32. 43. Chron. Mailross, 176. The use of juries in civil causes, except in the court of Exchequer, hath been long discontinued in Scotland. Perhaps the revival of that inestimable mode of trial will contribute something to the public felicity of the country: and a parliamentary revision of the criminal law of Scotland would no doubt add to those benefits which the Union communicated. An act was passed in 1808, (48 Geo. 3.

c. 151. s. 22. and 49 Geo. 3. c. 119.) to appoint commissioners to inquire into the forms of process in the Court of Session, and to report in what cases, and in what manner and form, "Jury trial" could be most usefully established in that court, &c. The commissioners appointed, having made their report, an act passed, 2d May 1815, 55 Geo. 3. c. 42. to facilitate the administration of justice in Scotland, "by extending trial by jury to civil causes;" the act to be in force for seven years. The most beneficial effects, have already resulted from the act, which is now (May 1819) undergoing amendments in parliament.

(a) Vide note (M) on ch. vii.

ib. 2. cap. 19, 20. Though since Glanville's time the law has been altered in England.

Also Glanville, lib. 7. cap. 1. makes a great doubt, whether the second son being enfeoffed by the father, and dying without issue, the land shall return to the father, or descend to his eldest, or to his youngest brother; and at last, gives such a decision, as we find almost in the same terms and words, recited in the question and decisions laid down in *Regiam Majest.* lib. 2. cap. 22.

Again, Glanville, lib. 7. cap. 1. makes it a difficult question in his time, whether the eldest son dying in the lifetime of his father, HAVING ISSUE, the nephew or the youngest son shall inherit; and gives the arguments *pro & contra*. *Regiam Majestatem*, cap. 33. seems to be even a transcript thereof out of Glanville.

And further, the tract concerning assizes, and the time of limitation, the very form of the writs, and the method of the process, and the directions touching their proceedings, are but transcripts of Glanville; as appears by comparing *Regiam Majestatem*, lib. 3. cap. 36. with Glanville, lib. 13. cap. 32. And the collector of those laws of Scotland, in all the before-mentioned places, and divers others, quotes Glanville, as the PATTERN at least of those laws.

But secondly, a second evidence is, because many of the laws which are mentioned in the *Regiam Majestatem*, *Quoniam Attachamento*, and other collections of the Scottish laws, are in truth VERY TRANSLATIONS of several statutes made in England in the times of king Henry III. and king Edward I. For instance; the statute of their king Robert II. cap. 1. touching alienations to religious men, is nothing else but an enacting of the statute of Mortmain, 13 Edw. I. cap. 13. The law above-mentioned, touching the disparagement of wards, is desumed out of *Magna Charta*, cap. 6. and the statute of Merton, cap. 6. So the law above-said, against ravishers of wards, is taken out of Westm. 2. cap. 35. So the said law of the double value of marriage is taken out of Westm. 1. cap. 22. The law concerning wreck of the sea, is but a transcript out of Westm. 1. cap. 4. Divers other instances of like nature might be given, whereby it may appear, that very many of those laws in Scotland, which are a part of their *corpus juris*, bear a similitude to the laws of England, and were taken, as it were, out of those common or statute laws here, that obtained in the time of Edward I. and before; but especially such as were

in use or enacted in the time of Edward I. And the laws of England, relative to those matters, were, as it were, the original and exemplar, from whence those similar, or parrallel, laws of Scotland, were derived or borrowed.

Thirdly, I come now to consider, the third particular, viz. by what means, or by what reason, this similitude of laws in England and Scotland happened; or upon what account, or how the laws of England, at least in many particulars, or *capita legum*, came to be communicated unto Scotland. And they seem to be principally these two, viz. first, the VICINITY of that kingdom to this: and secondly, the SUBJECTION of that kingdom unto the kings of England, at least for some considerable time.

Touching the former of these; first, it is very well known, that England and Scotland made but ONE ISLAND (*a*), divided not by the sea, or any considerable arm thereof, but only by the interjacency of the river Tweed, and some desart ground, which did not hinder any easy, common access of the people of the one kingdom, to the other. By this means, first, the intercourse of commerce between that kingdom and this, was very frequent and usual, especially in the northern counties; and this intercourse of commerce brought unto those of Scotland, an acquaintance and familiarity with our English laws and customs, which in process of time were adopted and received gradually into Scotland (*b*).

Again, secondly, this vicinity gave often opportunities of transplanting of persons of either nation into the other; especially in those northern parts. And thereby the English, transplanted and carried with them, the use of their native customs of England; and the Scots, transplanted hither, became acquainted with our customs, which by occasional remigrations were gradually translated, and became diffused and planted in Scotland. And it is

(*a*) By the 1 Jac. cap. 1. it is declared, that these two mighty, famous, and ancient kingdoms were formerly one.

(*b*) A remarkable proof of the LITTLE intercourse between the English and the Scots, before the union of the crowns in the person of James I. is to be found in two curious papers, one published by Haynes, the other by Strype: In the year 1567, Elizabeth commanded the bishop of London, to take a survey of all the strangers within the cities of London and Westminster. —By his report, which is very minute,

it appears, that the whole number of Scots, at that time, was only FIFTY-EIGHT. Haynes 455.—A survey of the same kind was made by Sir T. Row, Lord Mayor, A. D. 1568.—The number of Scots had then increased to EIGHTY-EIGHT. — Strype 4. — On the accession of James, a considerable number of Scots, especially of the higher rank, resorted to England; but it was not till the Union that the intercourse between the two kingdoms became great. Robert. Hist. Scot. v. 2, pa. 304.

well known, that, upon this account, some of the nobility and great men of Scotland had possessions **HERE**, as well as there. The earls of Angus were not only noblemen of Scotland, but were also barons of parliament **HERE**, and sat in our English parliaments ; as appears by the summons to parliament, *tempore Edwardi tertii*.

Again, thirdly, the kings of Scotland had **FEDAL** possessions **HERE**. For instance, the counties of Cumberland, Northumberland, and Westmoreland, were anciently held of the crown of England, by the kings of Scotland, attended with several vicissitudes and changes, until the feast of St. Michael 1237 ; at which time, Alexander king of Scotland finally released his pretensions thereunto ; as appears by the deed thereof, entered into the **Red Book** of the Exchequer, and the **Parliament Book** of 20 Edw. I. In consideration thereof, Henry III. gave him the lands of Penreth and Sourby, *habend' sibi hæredibus suis regibus Scotiæ* ; and, by virtue of that special limitation, they came to John the eldest son of the eldest daughter of Alexander king of Scotland, together with that kingdom. But the land of Tindale, and the manor of Huntingdon, which were likewise given to him and his heirs, but without that special limitation, **LEGIBUS SCOTIÆ**, fell in coparcenary ; one moiety thereof to the said John king of Scotland, as the issue of the eldest daughter, and the other moiety to Hastings, who was descended from the younger daughter of the said Alexander. Those possessions came again to the crown of England by the forfeiture of king John of Scotland ; who, through the favour of the king of England, had restitution of the kingdom of Scotland, yet never had restitution of those possessions he had in England, and forfeited and lost by his levying war against the kingdom of England, as aforesaid.

And thus I have shewn, that the vicinity of the kingdoms of England and Scotland, and the consequence thereof, viz. translations of persons and families, intercourse of trade and commerce, and possessions obtained by the natives of each kingdom in the other, might be one means for communicating **OUR LAWS** to them.

But secondly, there was another means far more effectual for that end, viz. the superiority and interest that the kings of England obtained over the crown and kingdom of Scotland ; whereby it is no wonder that many of our English laws were transplanted thither, by the power of the English kings. This interest, domi-

nion, or superiority of the kings of England in the realm of Scotland, may be considered these two ways, viz. first, how it stood antecedently to the reign of king Edward I.; and secondly, how it stood in his time.

Touching the former of these, I shall not trouble myself with collecting arguments or authorities relating thereto. He that desires to see the whole story thereof, let him consult Walsingham, *sub anno* 18 Edward I. as also Rot. Parl. 12 R. II. *pars secunda*, No. 3. Rot. Claus. 29 E. I. m. 10. dorso, and the letter of the nobility to the pope asserting it. Ibid.

And this might be one means, whereby the laws of England, in elder times, might in some measure be introduced into Scotland.

But I rather come to the times of king Edward I. who was certainly THE GREATEST REFINER of the English laws, and studiously endeavoured to enlarge the dominions of the crown of England, and to extend and propagate the laws of England into all parts subject to his dominion. This prince, besides the ancient claim he made to the superiority of the crown of England over that of Scotland, did for many years ACTUALLY ENJOY that superiority in its full extent. The occasion and progress thereof was thus, as it is related by Walsingham, and consonantly to him, appears by the records of those times; viz. King Edward I. having formerly received the homage and fealty of Alexander king of Scots, as appears Rot. Claus. 5 E. I. m. 5. dorso, was taken to be *superior dominus Scotiæ regni* (B).

(B) The homage usually paid by the kings of Scotland was not for their crown, but for some other territory. It is probable that the homage was performed in general terms without any particular specification of territory; and this inaccuracy had proceeded either from some dispute between the two kings about the territory and some opposite claims, which were compromised by the general homage, or from the simplicity of the age, which employed few words in every transaction. To prove this, we need but look into the letter of king Richard, where he resigns the homage of Scotland, reserving the usual homage. His words are, "Sæpe dictus W. rex ligeus homo noster deveniat de omnibus terris de quibus antecessores sui antecessorum nostrorum legei heredes fuerunt, et nobis atque hæredibus nostris fidelitatem jurarunt". These general terms were probably copied from the usual form of the homage itself.

It is no proof that the kings of Scotland possessed no lands nor baronies in England, because we cannot find them in the imperfect histories and records of

* Rymer vol. 1. p. 65.

that age. For instance, it appears clearly from another passage of this very letter of Richard, that the Scottish king had lands both in the county of Huntingdon and elsewhere in England; though the earldom of Huntingdon itself was then in the person of his brother, David; and we know at present of no other baronies which William held. It cannot be expected that we should now be able to specify all his fees which he either possessed or claimed in England, when it is probable that the two monarchs themselves and their ministers would at that very time have differed in the list: the Scottish king might possess some, of which his right was disputed; he might claim others, which he did not possess; and neither of the kings was willing to resign his pretensions by a particular enumeration.

Mr. Carte has taken advantage of the undefined terms of the Scots homage, and has pretended that it was done for Lothian and Galloway, that is, all the territories of the country now called Scotland lying south of the Clyde and Forth. But, to refute this pretension at once, we need only consider, that if those territories were held in fee of the English kings, there would, by the nature of the feudal law, as established in England, have been continual appeals from them to the courts of the lord paramount; contrary to all the histories and records of that age. We find, that as soon as Edward really established his superiority, appeals immediately commenced from all parts of Scotland; and that king, in his writ to the king's-bench, considers them as a necessary consequence of the feudal tenure. Such large territories also would have supplied a considerable part of the English armies, which never could have escaped all the historians: not to mention that there is not any instance of a Scots prisoner of war being tried as a rebel, in the many hostilities between the kingdoms, where the Scots armies were chiefly filled from the southern counties.

Mr. Carte's notion with regard to Galloway, which comprehends in the language of that age, or rather in that of the preceding, most of the south-west counties of Scotland, rests on so slight a foundation, that it scarce merits being refuted. He will have it (and merely because he will have it) that the Cumbria-land, yielded by king Edmund to Malcolm I. meant not only the county in England of that name, but all the territory northwards to the Clyde. But the use of Lothian deserves more consideration.

It is certain, that, in very ancient language, Scotland means only the country north of the Firths of Clyde and Forth. The southern country was divided into Galloway and Lothian; and the latter comprehended all the south-east counties. This territory was certainly a part of the ancient kingdom of Northumberland, and was entirely peopled by Saxons, who afterwards received a great mixture of Danes among them. It appears from all the English histories, that the whole kingdom of Northumberland paid very little obedience to the Saxon monarchs, who governed after the dissolution of the Heptarchy; and the northern and remote parts of it seem to have fallen into a kind of anarchy, sometimes invaded by the Danes, and sometimes concurring with them in their ravages upon other parts of England. The kings of Scotland, lying nearer them, took at first possession of their country, which had scarce any government; and we are told by Matthew of Westminster, p. 193, that king Edgar made a grant of the territory to Kenneth III. that is, he resigned claims which he could not make effectual, without bestowing on them more trouble and expence than they were

Alexander dying, left Margaret, his only daughter; and she dying without issue, about 18 E. I. there fell a controversy touching the succession of the crown of Scotland, between the king of Norway, claiming AS TENANT BY THE CURTESY. Robert de Bruce descended from the younger daughter of David king of

worth; for these are the only grants of provinces made by kings; and so ambitious and active a prince as Edgar, would never have given presents of any other kind. Though Matthew of Westminster's authority may appear small, with regard to so remote a transaction; yet we may admit it in this case, because Ordericus Vitalis, a very good authority, tells us, p. 701. that Malcolm acknowledged to William Rufus, that the Conqueror had confirmed to him the former grant of Lothian. But it follows not, because Edgar made this species of grant to Kenneth, that therefore he exacted homage for that territory. Homage and all the rites of the feudal law, were very little known to the Saxons; and we may also suppose, that the claim of Edgar was so antiquated and weak, that, in resigning it, he made no very valuable concession; and Kenneth might well refuse to hold, by so precarious a tenure, a territory which he at present held by the sword. In short, no author says he did homage for it.

The only colour indeed of authority for Mr. Carte's notion is, that Matthew Paris, who wrote in the reign of Henry III. before Edward's claim of superiority was heard of, says, that Alexander III. did homage to Henry III. *pro Laudibus et aliis terris**. This word seems naturally to be interpreted Lothian. But in the first place, Matthew Paris's testimony, though considerable, will not outweigh that of all the other historians, who say that the Scots homage was always done for lands in England. Secondly, if the Scots homage was done in general terms, (as has been already proved), it is no wonder that historians should differ in their account of the object of it, since the parties themselves were not fully agreed. Thirdly, there is reason to think that *Laudianum* in Matthew Paris does not mean Lothian in Scotland. There appears to have been a territory which anciently bore that or a similar name, in the North of England. For (1) the Saxon Chronicle, p. 197. says that Malcolm Kenmure met William Rufus in *Lodene* in England. (2) It is agreed by all the historians, that Henry II. only reconquered from Scotland, the northern counties of Northumberland, Cumberland and Westmoreland. See Newbriggs, p. 383. Wykes, p. 30. Hemmingford, p. 492. Yet the same country is called by other historians *Loidis*, *comitatus Lodonensis*, or some such name. See M. Paris, p. 68. M. West. p. 247. Annal. Waverl. p. 150. and Diceto, p. 531. (3) This last mentioned author, when he speaks of Lothian in Scotland, calls it *Lobencis*, p. 574. though he had called the English territory *Loidis*. (4) King David's charter to the church of Durham begins with this passage: "Omnibus Scotis et Anglis tam in Scotia quam in *Lodoneis* constitutis, &c." See Spelman Gloss. in verbo *Scotia*. Whence we may learn, that the province of *Lodoneium* was not only situated south of the Tweed, but also extended beyond Durham, and made a part of England. HUME.

* M. Par. 555.

Scots, and John de Baliol descended from the elder daughter, with divers other competitors.

All the competitors submit their claim to the decision of Edward I. king of England, as *SUPERIOR DOMINUS REGNI SCOTIÆ*; who thereupon pronounced his sentence for John de Baliol, and accordingly put him in possession of the kingdom, and required and received his homage.

The king of England, notwithstanding this, kept still the possession *ET INSIGNIA* of his superiority. His court of king's bench sat actually at Roxborough in Scotland, Mich. 20, 21 Edward I. *coram rege* (a); and upon complaint of injuries done by the said John king of Scots, now restored to his kingdom, he summoned him *OFTEN* to answer in *HIS* courts, Mich. 21, 22 Edward I. Northumb. Scot. He was summoned by the sheriff of Northumberland to answer to Walbesi in the king's court, *Pas.* 21 Edward I. *coram rege*. Rot. 34. He was in like manner summoned to answer John Mazune in the king's bench for an injury done to him; and judgment given against the king of Scots, and that judgment executed.

John king of Scots, being not contented with this subjection, did in the twenty-fourth year of king Edward I. resign back his homage to king Edward, and bid defiance to him; wherefore king Edward I. the same year, with a powerful army entered Scotland, took the king of Scots prisoner, and the *GREATEST PART* (b) of that kingdom into his possession; and appointed the earl Warren to be *custos regni*,—Cressingham to be his treasurer,—and Ormsby his justice; and commanded his judges of his courts of England to issue the king of England's writs *INTO SCOTLAND*.

And when, in the twenty-seventh year of his reign, the pope, instigated by the French king, interposed in the behalf of the king of Scotland, he and his nobility resolutely denied the pope's intercession and mediation.

Thus the kingdom of Scotland continued in an *ACTUAL* subjection to the crown of England for many years. For Rot. Claus. 33 E. I. membr. 18. dorso, and Rot. Claus. 34 E. I.

(a) See note (D) on chap. IX. and 2 Bur. 851.

(b) Hale, in the very next page, states, that Edward took the "WHOLE"

of Scotland into his actual administration, in consequence of his defeating John king of Scots.

membr. 3. dorso, several provisions are made for the better ordering of the government of Scotland.

What proceedings there were herein, in the time of Edward II. and what capitulations and stipulations were afterwards made by king Edward III. upon the marriage of his sister by Robert de Bruce, touching the relaxation of the SUPERIUS DOMINIUM of Scotland, is not pertinent to what I aim at; which is to shew HOW the English laws, that were in use and force in the time of Edward I. obtained to be of force in Scotland, which is but this, viz.

King Edward I. having thus obtained the actual superiority of the crown of Scotland, from the beginning of his reign, until his twentieth year, and then placing John de Baliol in that kingdom, and yet continuing his superiority thereof, and keeping his courts of justice, and exercising dominion and jurisdiction by his officers and ministers, IN THE VERY BOWELS OF THAT KINGDOM;—and afterwards, upon the defection of this king John, in the twenty-fourth of Edward I. taking the whole (a) kingdom into his actual administration, and placing his own judges and great officers there; and commanding his courts of king's bench, &c: HERE, to issue their process thither; and continuing in the ACTUAL administration of the government of that kingdom DURING LIFE,—it is no wonder that those laws which obtained and were in use in England, in and before the time of this king, were in a great measure translated thither. And possibly, either by being enacted in that kingdom, or at least for so long time put in use and practice there, many of the laws in use and practice HERE IN ENGLAND were, in his time, so riveted and settled in THAT kingdom, that it is no wonder to find they were not shaken, or altered, by the liberal concessions made afterwards by king Edward III. upon the marriage of his sister; but that they remain part of the municipal laws of that kingdom TO THIS DAY.

And that which renders it more evident, that this was one of the greatest means of fixing and continuing the laws of England in Scotland, in this, viz. this very king Edward I. was not only a martial and victorious, but also A VERY WISE AND PRUDENT PRINCE:—one that very well knew how to use a victory, as well as obtain it; and therefore knew it was THE BEST MEANS of

(a) Hale has just before stated that not the WHOLE, was subjugated. the GREATEST PART of Scotland only,

keeping those dominions he had powerfully obtained, BY SUBSTITUTING AND TRANSLATING HIS OWN LAWS INTO THE KINGDOM WHICH HE HAD THUS SUBDUED. Thus he did upon his conquest of Wales; and doubtless thus he did upon his conquest of Scotland: and those laws which we find there, so nearly agreeing with the laws of England used in his time, especially the statutes of West. 1. and Westm. 2. ARE THE MONUMENTS AND FOOTSTEPS OF HIS WISDOM AND PRUDENCE.

And as thus he was a most wise prince, and, to secure his conquests, introduced many other laws of his native kingdom into Scotland; so he very well knew the laws of England were excellent laws, fitted for the due administration of justice to the constitution of the governed; and fitted for the preservation of the peace of a kingdom, and for the security of a government: therefore he was very solicitous, by all prudent and careful means imaginable, to graft and plant the laws of England IN ALL PLACES where he might; having before-hand used all possible care and industry for rectifying and refining the English laws to their greatest perfection.

Again, it seems very evident, that the design of king Edward I. was by all means possible, to unite the kingdom of Scotland, as he had done the principality of Wales, to the crown of England: so that thereby Britain might have been one entire monarchy, including Scotland as well as Wales and England, under the same sceptre. In order to the accomplishing thereof, there could not have been a better means than to make the interest of Scotland one with England; and to knit them, as it were, together in one communion: which could never have been better done, than by establishing ONE COMMON LAW AND RULE OF JUSTICE AND COMMERCE among them; and therefore he did, as opportunity and convenience served, translate over to that kingdom as many of our English customs and laws as within that compass of time he conveniently could.

And thus I have given an essay of the reasons and means, how and why we find so many laws in Scotland, parallel to those in England, and holding so much of congruity and likeness to them.

And the reason why we have but few of their laws that correspond with ours, of a later date than Edward I. or at least Edward II. is, because since the beginning of Edward III. that

kingdom has been DISTINCT, and held little communion with us till the union of the two crowns in the person of king James I. (a). And in so great an interval it must needs be, that by the intervention and succession of new laws, much of what was so ancient as the times of Edward I. and Edward II. have received many alterations: so that it is a great evidence of the excellency of our English laws, that there remain to this day so many of them in force in that part of Great Britain; continuing to bear witness, that once that excellent prince Edward I. exercised dominion and jurisdiction THERE.

And thus far of the communion of the laws of England to Scotland, and of the means whereby it was affected. From whence it may appear, that as in Wales, Ireland and Normandy, so also in Scotland, such laws which in those places have a congruity or similitude with the laws of England, were derived from the laws of England, AS FROM THEIR FOUNTAIN AND ORIGINAL, and were not derived from any of those places to England (C).

(a) The kingdom of Scotland, notwithstanding the union of crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity in their laws. *Blac. Com.* 1 v. 95.

(C) However great the difficulties which seemed to obstruct the long intended and projected union, they were nevertheless in the end entirely done away, and the great work happily effected. This was accomplished at a period subsequent to the time of Sir Matthew Hale—in 1707—6 Anne;—when twenty-five articles of union were agreed to by the parliaments of both nations, the purport of the most considerable being,

That on the first of May 1707, and for ever after, the kingdoms of England and Scotland should be united into one kingdom, by the name of Great Britain.

That the succession to the monarchy of Great Britain should be the same as was before settled with regard to that of England.

That the united kingdom should be represented by one parliament.

That there should be a communication of all rights and privileges between the subjects of both kingdoms, except where otherwise agreed.

That when England raises 2,000,000*l.* by a land-tax, Scotland should raise 48,000*l.*

That the standards of the coin, of weights, and of measures, should be reduced to those of England.

That laws relating to trade, customs, and the excise, should be the same in Scotland as in England. But that all the other laws of Scotland should be in force; subject to alteration by the parliament of Great Britain: with this caution however, that laws relative to the public policy are alone subjugated to parliamentary interference; laws relating to private right not being to be altered, unless for the evident utility of the people of Scotland.

Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the house of commons.

The sixteen peers to have all privileges of parliament: and all peers of Scotland to be peers of Great Britain, and to have all the privileges of peers, except sitting in the house of lords and voting on the trial of a peer.

These are the principal of the twenty-five articles of union; against some of which, however, the Lords North and Grey, Rochester, Howard, Leigh, Buckingham, and Guildford, protested. "We humbly conceive, (say the protesting peers) that the sum of forty-eight thousand pounds to be charged on the kingdom of Scotland, as the quota of Scotland, for a land-tax, is not proportionable to the aid granted by the parliament of England: but if by reason of the present circumstances of that kingdom, it might have been thought it was not able to bear a greater proportion, at this time, yet we cannot but think it unequal to this kingdom, that it should be agreed, that when the four shillings aid shall be enacted by the parliament of Great Britain to be raised on land in England, that the forty-eight thousand pounds now raised in Scotland shall never be increased in time to come; though the trade of that kingdom shall be extremely improved, and consequently the value of their land proportionably raised, which in all probability it must do, when this union shall have taken effect.—And we humbly conceive, that the number of sixteen peers of Scotland is too great a proportion to be added to the peers of England, who very rarely consist of more than one hundred attending lords, in any one session of parliament; and for that reason, we humbly apprehend, such a number as sixteen may have a very great sway in the resolutions of this house, of which the consequences cannot now be foreseen. In the next place, we conceive, the lords of Scotland who, by virtue of this treaty, are to sit in this house, being not qualified as the peers of England are, must suffer a diminution of their dignity to sit here on so different foundations; their right of sitting here depending entirely on an election, and that from time to time, during the continuance of one parliament only; and at the same time, we are humbly of opinion, that the peers of England who sit here by creation from the crown, and have a right of so doing in themselves, or their heirs, by that creation for ever, may find it an alteration in their constitution, to have lords added to their number, to sit and vote in all matters brought before a parliament, who have not the same tenure of their seats in parliament as the peers of England have." *Die Jovis 27^o Feb. 1706.*

By the statute 5 Ann. c. 8. the articles of the union are ratified and confirmed. In this statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann.

c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed.

And it is enacted, that "these two acts shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles, and act of union, it is to be observed, first, that the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union*." Secondly, that whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity, which establish our common prayer, are expressly declared so to be. Thirdly, that therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given) would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. Fourthly, that the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland†.

Thus were united two kingdoms, which, by their situation, were destined for the formation of one great and powerful monarchy. And by this solemn

* It may justly be doubted, (says Blackstone) whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an incorporate union (which is well distinguished by a very learned prelate from a federate alliance, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of revival: and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's Alliance, 195.) But the wanton, or imprudent exertion of this right would probably raise a very

alarming ferment in the minds of individuals; and therefore such an attempt might endanger (though by no means destroy) the union.

To illustrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals. Blac. Com. 1 v. 97.

† Blac. Com. 1 v. 96.

junction of his whole native force, Great Britain hath risen to an eminence and to an authority in Europe, which England and Scotland could never have attained.

Those who are desirous of knowing the origin and constitution of the parliament in Scotland before the union, and of the change made by the establishment of one parliament for Great Britain, may consult the treatise on the laws of election for Scotland, with which Mr. Wight hath obliged the public.

The union had not long been effected, before the House of Lords began to exercise its jurisdiction over those articles which related to the peerage. Queen Anne (26th May, in the 7th year of her reign) created James duke of Queensbury, baron of Rippon, marquis of Beverley, and duke of Dover; remainder (his eldest son being an idiot) to his second son, then earl of Solway in Scotland. On the 21st of January 1708-9, the House of Lords resolved that a peer of Scotland, claiming to sit in the House of Peers by virtue of a patent passed under the great seal of Great Britain, had no right to vote in the election of the sixteen peers who represent the peers of Scotland in parliament.

At a subsequent period* the duke of Hamilton having been created duke of Brandon, it was resolved by the lords, that "no patent of honour granted " to any peer of Great Britain who was a peer of Scotland at the time of the " union, should entitle him to sit in parliament." And afterwards†, when the Earl of Solway petitioned for his writ of summons as duke of Dover, the question was again agitated, and decided as before‡. In 1782, however, the then duke of Hamilton claimed to sit in the House of Peers as duke of Brandon. The question was ultimately referred to the twelve Judges, who were unanimously of opinion, that a peer of Scotland, was competent to receive a patent of peerage of Great Britain, and to enjoy all its incidental privileges; and his grace sat as duke of Brandon in the House of Peers. In the course of the year 1787, the attention of the House was again called to the former question. Two of the sixteen peers of Scotland had been created peers of Great Britain. The act of union was silent upon the subject; and the only precedent which existed, was that of the duke of Athol; who, in 1736, being one of the sixteen peers, the English barony of Strange *devolved upon him by inheritance*§, and which was decided in the affirmative. Notwithstanding which, as the negative appeared to be strongly supported by every principle of equity, analogy, and fair construction, the question was brought forward for public decision. Accordingly on the 13th of February 1787, the House resolved itself into a committee of privileges, for the purpose of taking it into consideration. The motion was, "that it is the opinion of this committee, " that the Earl of Abercorn, who was chosen to be of the number of the " sixteen peers, who by the treaty of union are to represent the peerage of " Scotland in parliament, having been created Viscount Hamilton, by letters " patent under the great seal of Great Britain, doth thereby cease to sit in the

* 20 Decembris 1711.

† A. D. 1719.

‡ 1 P. Wms. 582. 2 Eq. Ca. Abr. 707. pl. 1.

§ That was by a descent; and even as to the latter question, I believe no objection was ever made to a peer of England taking a Scotch title, by descent.

"House as a representative of the peerage of Scotland." The motion was carried by a majority of 52 to 38; and was followed by a similar one respecting the duke of Queensbury, who had been created baron Douglass. On the 18th of May following, it was resolved, that a copy of the resolution of 1709, should be transmitted to the lord register of Scotland, as a rule for his future proceedings in elections. The duke of Queensbury and the marquis of Abercorn, nevertheless persisted in their right to vote in the election of peers, to represent the peerage of Scotland in parliament; and therefore in the general election of 1790, tendered their votes, as peers of Scotland, to the lord register, who, in obedience with the resolutions before stated, thought proper to reject them. Of this they complained, by petition, to the house of peers, praying, that their votes might be reckoned. A committee of privileges reported that "the votes, if duly tendered, ought to have been counted." To which the house, on the 6th of June 1793, agreed, without a division. Contrary, as this decision certainly is, to the former resolutions, yet it was come to, after great deliberation, and after the subject had been fully argued and thoroughly investigated. It should seem that the former resolutions were not binding, inasmuch as they were not only contrary to the express terms and meaning of the articles of union, to law, justice, and the constitution, but had never been sanctioned either by practice or acquiescence*.

On the 23d of May 1787, another question respecting the construction of the act of union was agitated in the house of commons. It arose in consequence of the succession of the earl of Wemyss to that earldom; whose eldest son, Francis Charteris, lord Elcho, represented the boroughs of Lauder, &c. in Scotland. By the ancient parliamentary law of Scotland, the eldest sons of peers could not sit in the house of commons; and by an article in the act of union, it is provided, that the two kingdoms should participate reciprocally in the privileges, rights, and immunities of each other. The motion made was, "that a new writ should be made out for electing a member for the districts of Lauder, &c. in the room of Francis Charteris, esq. now become the eldest son of a peer of Scotland, and therefore incapable of representing the said districts in this house." The motion was carried without a division†.

* See Parl. Reg. by Debrett, vol. xxxvi.

in the House of Lords, 26 March 1793.

† Ann. Reg. for 1787, p. 147. Wight
269. And see lord Daer's case, determined

Deb. Parl. Reg. vol. xxxvi. p. 143.

CHAP. XI.

Touching the course of DESCENTS in England.

AMONG the many preferences that the laws of England have above others, I shall single out TWO PARTICULAR TITLES, which are of common use, wherein their preference is very visible. The due consideration of their excellence therein, may give us a handsome indication, or specimen, of their excellencies above other laws, in other parts or titles of the same, also.

The titles, or *capitula legum*, which I shall single out for this purpose, are these two, viz. first, the hereditary transmission of lands from ancestor to heir, and the certainty thereof; and secondly, the manner of trial BY JURY; which, as it stands at this day settled in England, together with the circumstances and appendixes thereof, is certainly THE BEST MANNER OF TRIAL IN THE WORLD. And I shall herein give an account of the successive progress of those *capitula legis*, and what growth they have had in succession of time, till they arrived to that state and perfection which they have now obtained.

First, then, touching descents and hereditary transmissions.

It seems by the laws of the Greeks and Romans, that the same rule was held both in relation to lands and goods, where they were not otherwise disposed of by the ancestor, which the Romans therefore called SUCCESSION AB INTESTATO. But the customs of particular countries, and especially here in England, do put a great difference, and direct a SEVERAL method in the transmission of goods or chattels, and that of the inheritances of LANDS.

Now as to hereditary transmissions or successions, commonly called with us DESCENTS, I shall hold this order in my discourse, viz.

First, I shall give some short account of the ancient laws of the Jews, the Greeks, and the Romans, touching this matter.

Secondly, I shall observe some things, wherein it may appear, how the particular customs, or municipal laws, of other countries varied from those laws, and the laws HERE formerly used.

Thirdly, I shall give some account of the rules and laws of descents, or hereditary transmissions, as they FORMERLY stood, and as at this day they stand, in England; with the successive alterations that process of time, the wisdom of our ancestors, and certain customs grown up, TACITLY, GRADUALLY, and SUCCESSIVELY, have made therein.

And first, touching the laws of succession, as well of descent of inheritances of lands, as also of goods and chattels; which, among the Jews, was the same in both.

Mr. Selden, in his book *De Successionibus apud Hebræos*, has given us an excellent account, as well out of the holy texts, as out of the comments of the rabbins, or Jewish lawyers, touching the same; which you may see at large in the fifth, sixth, seventh, twelfth and thirteenth chapters of that book; and which, for so much thereof as concerns my present purpose, I shall briefly comprize under the eight following heads, viz. (a).

First, that in the descending line, the descent or succession, was to ALL the sons; only the ELDEST son had a DOUBLE portion to any one of the rest; if there were three sons, the estate was to be divided into four parts, of which the eldest was to have two fourth parts, and the other two sons were to have one fourth part each.

Secondly, if the son died in his father's lifetime, then THE GRANDSON, and so *in infinitum*, succeeded in the portion of his father, as if his father had been in possession of it, according to the *jus representationis* NOW IN USE HERE.

Thirdly, the daughter did NOT succeed in the inheritance of the father, AS LONG AS THERE WERE SONS, OR ANY DESCENDANTS FROM SONS, IN BEING;—but if any of the sons died in the lifetime of his father HAVING DAUGHTERS, but WITHOUT SONS, the daughters succeeded in HIS PART, as if he himself had been possessed.

Fourthly, and in case the father left only daughters and no sons, THE DAUGHTERS EQUALLY SUCCEEDED to their father, as

(a) Vide Numb. c. 26. v. 33. c. 27. and c. 36, and Blac. Com. 2 v. 213.

in COPARTNERSHIP, without any prelation, or preference, of the eldest daughter, to two parts, or a double portion.

Fifthly, but if the son had purchased an inheritance, and died without issue, LEAVING A FATHER AND BROTHERS, the inheritance of such son so dying, did NOT descend to the brothers ;—unless in case of the next brother taking to wife the deceased's widow, to raise up children to his deceased brother :—but in such case, THE FATHER INHERITED to such son entirely.

Sixthly, but if the father in that case was dead, then it came to the brothers, as it were, AS HEIRS TO THE FATHER, in the same manner as if the father had been actually possessed thereof ; and therefore the father's other sons, and their descendants *in infinitum*, succeeded ; but yet especially, and WITHOUT ANY DOUBLE PORTION TO THE ELDEST : because though in truth the brothers succeeded, as it were in right of representation FROM THE FATHER, yet if the father died BEFORE the son, the descent was DE FACTO immediately from the brother deceased, to the other brothers ; IN WHICH CASE their law gave NOT a double portion : and in case the father had no sons, or descendants from them, then it descended to ALL THE SISTERS.

Seventhly, if the son died without issue, and his father, or any descendants from him, were extant, it went NOT to the grandfather or his other descendants. But if the father was dead without issue, then it descended to the grandfather. And if he were dead, then it went to HIS sons and their descendants ; and for want of them, then to HIS DAUGHTERS or their descendants ;—as if the grandfather himself had been actually possessed, and had died ; and so *mutatis mutandis* to the *proavus*, *abavus*, *atavus*, &c. and their descendants.

Eighthly, but the inheritance of the son NEVER RESORTED TO THE MOTHER, or to any of her ancestors ; but both she and they were TOTALLY EXCLUDED from the succession.

The double portion, therefore, that was *jus primogenitura*, never took place but in that person that was the *primogenitus* of him from whom the inheritance IMMEDIATELY descended, or HIM that represented him.—As if *A.* had two sons, *B.* and *C.*—and *B.* the ELDEST had two sons, *D.* and *E.*—and then *B.* died ;—whereas *B.* should have had a double portion, viz. two thirds IN CASE HE HAD SURVIVED HIS FATHER,—but now this double portion shall be equally divided between *D.* and *E.*—and *D.* shall

NOT have two thirds of the two thirds that descended from A. to them. Vide Selden, ut supra.

Thus much of the laws, or rules, touching descents among the Jews.

Among the Grecians (a), the laws of descents in some sort resembled those of the Jews, and in some things they differed. Vide Petit's *Leges Atticæ*, cap. 1. tit. 6. *De Testamentis & Hæreditario Jure*, where the text of their law runs thus, viz.

“ Omnes legitimi filii hæreditatem paternam ex æquo inter se hæriscento, si quis intestatus moritur relictis filiabus qui eas in uxores ducunt hæredes sunt, si nullæ supersint, hi ab intestato hæreditatem cernunt: et primo quidem fratres defuncti Germani, et legitimi fratrum filii hæreditatem simul adeunt; si nulli fratres aut fratrum filii supersint, iis geniti eadem lege hæreditatem cernunt: masculi autem iis geniti etiam si remotiori cognationis sint gradu, præferuntur, si nulli supersint, paterni proximi, ad sobrinorum usque filios, materni defuncti propinqui simili lege hæreditatem adeunt; si e neutra cognatione supersint intra definitum gradum proximus cognatus paternus, addito notho nothave; superstite legitima filia nothus hæreditatem patris ne addito.”

This law is VERY OBSCURE. The sense thereof seems to be briefly this; that all the sons EQUALLY shall inherit to the father; but if he have no sons, then the husbands of the daughters; and if he have no children, then his brothers and their children; and if none, then his next kindred on the part of his father, PREFERRING THE MALES BEFORE THE FEMALES; and if none of the father's line, *ad sobrinorum. usque filios*, then to descend to the mother's line. Vide Petit's Gloss thereon (A).

(a) At least among the Athenians—see Blac. Com. 2 v. 213. and Pot. Archæ Græca, l. 4. c. 15.

(A) The Editor of the first edition of this History* makes the following remark on the observation of Hale upon the law from Petit.

“ But with all respect to the memory of this great good man, I shall venture to translate this law, whereby it will appear, what the true sense and meaning thereof is, and that it is not so difficult or obscure as our author has represented it.”

“ All the lawful sons shall inherit their father's estate, to be equally divided

* Ed. 1713. pa. 212.

Among the Romans it appears, that the laws of successions, ordescents, DID SUCCESSIVELY VARY ; for the laws of the Twelve

“ between them. If any person dies intestate, leaving only daughters, their husbands shall be his heirs; but if none of the daughters be living, they (i. e. the husbands) shall not inherit to the intestate. But then in the first place, the brothers of the whole blood, and such brothers' children, shall inherit together, (i. e. the children *jure representationis*) and if there are no brothers, or brothers' children, living, then their descendants, if they leave any, shall inherit by the same law of equal distribution; yet still the males and their descendants, though of the more remote degree of kindred, are to be preferred. But if none of the father's blood be living, of any nearer degree than that of father's brother's children, then the inheritance shall descend to those of the mother's blood, having a like regard to the law of distributions, and the mother's brother's children. But if none of either line, within the degrees before specified, be living, then it shall descend to any of the father's blood, though an illegitimate son or daughter; but if a legitimate daughter were living, no bastard shall succeed in the inheritance of the father.” Vide Petit's Gloss. *in hanc legem*.

Sir Matthew Hale professed to touch very shortly on the subject. Contenting himself with transcribing the version of Petit, without having recourse to the authors by whom the originals are preserved and explained, his account of the Attic laws is certainly not very correct. He complains that the “ law is very obscure.” It is indeed, as he cites it, not only dark, but corrupt; and the sense which he collects from it, by no means perspicuous. A desire of removing this obscurity, and of supplying a defect, however unimportant, in the work of so great a man, induced Sir William Jones, the ablest linguist of his age and nation, to publish a translation of the “ Speeches of Isæus, in Causes concerning the Law of Succession to Property at Athens.” From this ingenious work I have selected the following Attic laws.

“ All genuine, unadopted citizens may devise their estates as they think fit, provided that they have no legitimate children, and be not disabled by lunacy, or age, or poison, or disease; nor influenced by women, so as to have lost their reason from any of these causes; nor be under any duress or confinement.

“ The wills of such as have legitimate sons shall stand good, if those sons die before their age of sixteen years.

“ If a man have legitimate daughters, he may devise his estate as he pleases, on condition that the devisees take them in marriage.

“ Adopted sons shall not devise the property acquired by adoption; but if they leave legitimate sons, they may return to their natural family. If they do not return, the estates shall go to the heirs of the persons who adopted them.

“ The adopted son and the after-born sons of the person who adopted him, shall be coheirs of the estate; but no adoption by a man who has legitimate sons then born, shall be valid.

“ If a citizen die intestate and leave daughters, the nearest kinsmen who marry them shall inherit the estate: but if he die childless, his brothers by the same father shall be his heirs, and the legitimate sons of those brothers shall

Tables did exclude the females from inheriting, and had many other streightnesses and hardships, which were successively remedied. First, by the emperor Claudius, and after him by Adrian, in his *Senatus Consultus Tertullianus*; and after him by Justinian in his Third Institute, tit. *De Hæreditatibus quæ ab Intestato deferuntur*, and the two ensuing titles. And again, all this was further explained and settled by the Novel Constitutions of the said Justinian, styled *Authenticæ Novellæ*, cap. 18. *De Hæreditatibus ab Intestato venientibus & Agnatorum Jure sublato*. Therefore omitting the large inquiry into the successive changes of the Roman law in this particular, I shall only set down how, according to that constitution, the Roman law stands settled therein (B).

succeed to the share of their fathers. If there be no brothers, the sisters on the father's side, and their children, shall inherit. On failure of sisters and nephews, the cousins on the father's side shall be heirs in the same manner; but males and the children of males shall be preferred, although in a remoter degree, provided they belong to the same branch. If there be no kinsman on the father's side so near as the second cousin, then let those on the mother's side succeed to the estate in the same order. Should there be no maternal kinsmen, within the degree above limited, the next paternal kinsmen shall be the heirs.

"No male or female bastard, born after the archonship of Euclid, shall succeed either to sacred or civil rights."

The Athenians made no difference between the transmission of real and personal property. In these laws, therefore, the words *devise*, *heir*, *inheritance*, and the like, are applied both to lands and to goods, without being restrained to the peculiar sense in which we use them *.

* Jon. Isæus, 37.

(B) The preference of males to females was totally unknown to such of the laws of Rome as are at present extant.

"Cum filius filiave (says the emperor) et ex altero filio nepos neptisve existunt, pariter ad hæreditatem avi vocantur, nec, qui gradu proximior est, ulteriorem excludit: æquum enim esse videtur, nepotes neptesve in patri sui locum succedere. Pari ratione et si nepos neptisve sit ex filio, et ex nepote pronepos proneptisve, simul vocantur. Et, quia placuit, nepotes neptesve, item pronepotes proneptesve, in parentis sui locum succedere, conveniens esse visum est, non in capita, sed in stirpes, hæreditatem dividi; ut filius partem dimidiam hæreditatis habeat, et ex altero filio duo pluresve nepotes alteram dimidiam. Item, si ex duobus filiis nepotes neptesve existant, ex altero unus aut duo forte, ex altero tres aut quatuor, ad unum aut duos dimidia pars pertineat, ad tres vel quatuor altera dimidia." Inst. lib. 3. t. 1. § 6. 15.

[Item ex duobus filiis.] By the civil law, representation takes place in *infinitum* in the right line descending; and therefore it follows, according to that law,

that when any person dies, leaving grandchildren by sons or daughters, who died in his lifetime, such grandchildren, though equal in degree and unequal in their number, in regard of their respective stocks, will divide the estate of their grandfather *per stirpes*, i. e. according to their stocks; for example, if Titius dies worth nine hundred *aurei*, and intestate, leaving only grandchildren by three sons, already dead,—e. g. three children by one son, five by another, and six by another, then each of these classes of grandchildren would be intitled to a third; that is, to three hundred *aurei*, no regard being paid to that class in which there were most persons. In hoc casu, (says Vinnius) maxime conspicua est vis representationis; licet enim omnes hic pari gradu sint, ut proprio singuli jure succedere posse videantur, tamen postquam semel placuit, nepotes in locum patris sui demortui, aliave ratione exuti jure sui hæredis, succedere, non debuit hoc jus ex accidenti aliquo variari, puta ut soli nepotes ex diversis filiis et numero inæquales, cum pauciores cum pluribus ex hac vel illa stirpe concurrentes, in capita hæreditatem dividerent.—Cod. 6. t. 55. l. 2. Quare sic in universum recte definiemus, *descendentes ex masculis omnes, qui sunt diversarum stirpium, quantumvis ejusdem omnes gradus, in stirpes, non in capita, succedere.*

The succession to the estates of intestates, was one of the most uncertain points of the Roman law. Even the distribution which had for some time prevailed, took a different turn, and even that while the emperor was compiling his body of law; for the system of the *Novels* (the CXVIII. particularly) defeats the doctrine laid down in several of the titles of the Third Book of the *Institutes*, where the point was considered, and meant to be established. With the *Novels*, however, it settled, and the great rule of succession among the Romans, *quoad* descendants, is comprised in these few reflections:—that descendants, while they lasted, should exclude all other relations whatsoever;—that there should be no respect had to primogeniture; nor any preference in regard to sex;—that there should be no exclusion, even of the most remote degree; and lastly, that the estate of the intestate should make so many *general* shares, as there should be distinct heads, in his immediate descendants.

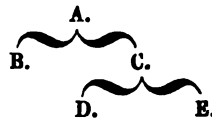
Hence it is obvious that inheritances could never revert, or be thrown upwards (*inter ascendentes*), nor be turned aside (*inter collaterales*), so long as any were to be found in the line of descendants *in infinitum*. For the principle upon which this succession rested, was the *jus representationis*, which cannot be fairly or reasonably imagined in any other line, than in that to which we give existence. There is something of successive in the idea of representation, something which looks like keeping up an order or a series; and though to brothers it may be applied in some sense, to fathers and grandfathers it can be applied in little or none.

The disregard of sex and primogeniture, in which these people differed from most others, as well before as after them, are of so arbitrary a consideration, that little remains to be observed upon that disposition. But natural equity has a great share in the two last, and calls for some regard.

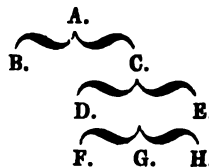
That descendants of the second, third, or fourth degree should be raised to a kind of level with those of the first, and not stand excluded, even while some of the first remain; and that children of a remote descent should inherit along with the immediate one, is agreeable to truth and justice. The grandchildren,

Descents or successions from any person are of three kinds, viz. first, in the descending line. Secondly, the ascending line. Thirdly, the collateral line; and this latter is either IN AGNATOS A PARTE PATRIS; or, IN COGNATOS A PARTE MATRIS (C).

&c. of *Sempronius* by a son that is gone, stand to *Sempronius* in the place of that son. They would have had their shares through that father, if he had lived; and represent him therefore, or succeed to his rights, now he is removed. And hence, because many children may succeed into one father's rights, it follows that the *jus repræsentationis*, which transmits the estate of *Sempronius* to his immediate descendants, shall undergo a considerable alteration in those descents or generations that follow after. Though *Sempronius* may be represented by any number of children indifferently, and his estate cut into so many shares accordingly, yet will each of those children be represented by their whole families; not by so many distinct heads of children, as *Sempronius* was, but by all their children collectively (let their number be what it will) laying as it were, their heads together to form one common stock: for all those grandchildren *gregatim*, have that right in common, not separate to each, which their father had to himself. And this is called *successio in stirpes*; the other, when all share alike, *in capita*. Thus in the scheme,



the estate of *Sempronius*, A. will be divided into equal parts, and B. and C. will each be heirs *ex semisse*. But supposing that C. is gone before his father, then shall B. still be hæres *ex semisse*, and D. and E. *ex quadrante*, each. Or put the case



that C. and D. should each be gone, and D. be represented by F. G. and H.—then will B. as before, be hæres *ex semisse*; E. *ex quadrante*; and F. G. and H. will succeed each of them *ex uncia*. Or put the case that E. is dead without issue also, then will F. G. and H. be each of them hæres *et sextante*. Taylor's Elements of the Civil Law, 538. As to the doctrine respecting ascendants and collaterals, see Id. 539 to 544. See also Domat's Civil Law, part 2. lib. 2. tit. 1, 2, 3.—And in general as to the right of property, inheritance, and succession, and civil degrees of kindred among the Romans, see Gib. Hist. 8 v. oct. 70.

(C) Sunt autem agnati*, cognati per virilis sexus cognationem conjuncti,

* The distinction between the *agnati* and *cognati*, is entirely taken away by Justinian, Nov. 118. csp. 4, 5.

First, in the descending line, these rules are by the Roman law directed, viz.

First, the descending line, whether male or female, whether immediate or remote, takes place; and prevents the descent or succession, ascending or collateral, *in infinitum*.

Secondly, the remote descents of the descending line succeed IN STIRPEM,—i. e. in that right which the parent SHOULD HAVE HAD.

Thirdly, this descent, or succession, IS EQUAL in all the daughters, all the sons, and all the sons and daughters, WITHOUT PREFERRING THE MALE BEFORE THE FEMALE.—So that if the common ancestor had three sons, and three daughters, EACH of them HAD A SIXTH PART. And if one of them had died in the life of the father, having three sons and three daughters, the sixth part that belonged TO THAT PARTY, should have been divided EQUALLY BETWEEN HIS or her six CHILDREN. And so *in infinitum* in the descending line.

Secondly, in the ascending line, there are these two rules, viz.

First, if the son dies WITHOUT ISSUE, or any descending from him, having a father and a mother living; BOTH OF THEM SHALL EQUALLY SUCCEED to the son, and prevent all others of the col-

quasi a patre cognati; veluti frater ex eodem patre natus, fratris filius, neposve ex eo: item patruus et patruī filius, neposve ex eo: at, qui per fœminini sexus personas cognatione junguntur, agnati non sunt, sed alias naturali jure cognati. Itaque amitæ tunc filius non est tibi agnatus, sed cognatus: et invicem tu illi eodem jure conjungeris: quia, qui ex ea nascuntur, patris non matris, familiam sequuntur. Inst. lib. 1. tit. 15. § 1.

Sunt autem agnati, cognati per virilis sexus personas cognatione conjuncti, quasi a patre conati*. Itaque ex eodem patre nati fratres, agnati sibi sunt; qui et consanguinei vocantur; nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio, et invicem is illi, agnatus est. Eodem numero sunt fratres patruales, id est, qui ex duobus fratribus procreati sunt, qui etiam consobrini † vocantur. Qua ratione etiam ad plures gradus agnationis pervenire poterimus. Ii etiam, qui post mortem patris nascuntur, jura consanguinitatis nanciscuntur. Non tamen omnibus simul agnatis dat lex hæreditatem; sed iis qui tunc proximior gradu sunt, cum certum esse ceperit, aliquem intestatum decessisse. Inst. lib. 3. tit. 2. § 1. and see Taylor's Elem. 314.

* A patre conati] "cognator est nomen generale; sed non tantum generale; plerumque autem speciale est, et primum eorum, qui vel per fœminini sexus personas conjunguntur vel capitis diminutione jura agnationis amisserunt."

† Consobrini] "Per abusionem sic dicti; consobrini enim proprie sunt, qui ex duobus sororibus nati sunt; ita dicti, quasi consororini." Theoph.

lateral line, except brothers and sisters. And if only a father, or only a mother, he or she shall succeed ALONE.

Secondly, but if the deceased leaves a father and a mother, WITH A BROTHER AND A SISTER, *ex utrisque parentibus conjuncti*, they all four shall EQUALLY SUCCEED to the son, by equal parts, without preference of the males.

Thirdly, in the collateral line, i. e. where the person dies WITHOUT father or mother, son or daughter, or any descending from them IN THE RIGHT-LINE—the rules are these, viz.

First, the brothers and sisters, EX UTRISQUE PARENTIBUS CONJUNCTI, and the IMMEDIATE children of them, shall succeed EQUALLY, without preference of either sex; and the children from them shall succeed IN STIRPES.—As if there be a brother and sister, and the sister dies in the life of the descendant, leaving one or more children, all such children shall succeed IN THE MOIETY that SHOULD HAVE COME to their deceased mother, had she survived.

Secondly, but if there be NO brothers or sisters, EX UTRISQUE PARENTIBUS CONJUNCTI, nor any of their immediate children,—then the brothers and sisters of the HALF blood, and their immediate children, shall succeed IN STIRPES to the deceased,—without any prerogative to the male.

Thirdly, but if there be no brothers or sisters of the whole, or half blood, nor any of their immediate children—for the grandchildren are not provided for by the law (a)—then the NEXT KINDED are called to the inheritance.

Fourthly, and if the next kindred be in an EQUAL degree, whether on the part of the father, as AGNATI, or on the part of the mother, as COGNATI, then they are EQUALLY called to the inheritance, and succeed IN CAPITA, and not IN STIRPES.

Thus far of the settled laws of the Jews, Greeks, and Romans. But the particular, or municipal laws and customs of almost every country derogate from those laws, and direct successions in a much different way. For instance,

By the customs of Lombardy, according to which the rules of the feuds, both in their descents and in other things, are much directed, their descents are in a much different manner, viz.

Leges Feudarum, lib. 1. tit. 1. If a feud be granted to one

(a) But, by the author's leave, (adds the Editor of the *third* edition of this work,) I think the grandchildren are impliedly provided for, as they succeed their father or mother *jura representationis*.

brother, who dies without issue, it descends NOT to his other brother, UNLESS IT BE SPECIALLY PROVIDED FOR IN THE FIRST INFEUDATION. If the donee dies, having issue sons and daughters, it descends ONLY TO THE SONS. Whereas by the Roman law, it descends to both. The brother succeeds not to the brother, unless specially provided for. *Ibid. tit. 50.* The ascendants succeed NOT, but only the descendants. Neither does a daughter (a) succeed NISI EX PACTO, VEL NISI SIT FEODUM FÆMI-NEUM (D).

(a) It was one reason given in the feudal law, for the exclusion of daughters, *quia filix servitia præstare non possunt.* But see Blac. Com. 2 v. 214. and Sulliv. Lect. xiv.

(D) As to the descent of inheritances by the feudal law, it may not be unnecessary, in the first place, to observe, that feuds, fiefs, or fees, were originally precarious, and held at the will of the lord*.

A precarious tenure during pleasure, was not sufficient to satisfy those who held it; to attach them therefore to their superior lord, they soon obtained the certainty of them for one year†, and afterwards for life‡: but though feuds were not then hereditary, yet the vassals of feudal tenants were called *nativi*, as if born such; and it was unusual, and, whenever done, was thought hard, to reject the heir of the former feudatory, provided he was of ability to do the services of the feud, and the lord had no objection against him§. But though the lord did not remove the heir from the feud, yet it is not likely that he succeeded absolutely as of course; but that he paid a fine, or made some acknowledgment, in the nature of *relief*||, for the removal of the feud; and though that was originally made in order to secure the succession, which was then, in every sense of the expression, at the will of the lord; yet it was continued even after feuds

* Antiquissimo tempore sic erat in dominorum potestate connexum, ut quando vellent, possent auferre rem in feudum a se datam. Feud. lib. 1. tit. 1. Statim ab initio originis feudorum in domini feudum concedentis potestate fuit, feudum concessum quandocunque vellet precarii instar, revocare. Hanneton de jure feud. 139. Som. Treat. of Gav. 108. Innumerable proofs might be added to those produced in l'Esprit du Loix, l. 30. c. 16. and by Du Cange voc. *beneficium* & *feudum*.

† Postea vero eo ventum est ut per annum tantum firmitatem haberent. Feud. lib. 1. tit. 1. Deinde usu inolevit ut per annum integrum feudum seneel concessum firmitatem haberet. Hanneton de jure feud. 139.

‡ Deinde statutum est ut usq; ad vitam fidelis produceretur. Feud. lib. 1. tit. 1. Postea vero eo ventum est, ut ad recipientis vitam perduraret. Hanneton de jure feud. 139. Du Cange produces several

quotations from ancient charters and chronicles in proof of this. Gloss. voc. *beneficium*.

§ Licet hæreditaria successio tum non erat in feudis, nativi tamen hi tenentes dicebantur ut apud nos hodie, quos nisi justa offensæ causa præcesserit, et ad serviendum non sufficerent, durum erat a suis possessionibus removere. Crag. de jure feud. 20, 21.

|| Relevium est præstatio hæredum, qui quum veteri jure feudali non poterant succedere in feudis, caducam, et incertam hæreditatem relevabant, soluta summa vel pecuniæ vel aliarum rerum pro diversitate feudorum.—Schilt. Cod. de bonis laudemialibus, sect. 52. According to Hotoman, relevium dicitur honorarium, quod novus vasallus patrono introitus causa largitur, quasi morte alterius, vel alio quo casu feudum ceciderit, quod jam a novo sublevetur. Hot. de verb. *feudal.* et Gloss. ad X. Scriptores ad verb. *relevium*.

If we come nearer home, to the laws of Normandy, lands there are of two kinds, viz. PARTIBLE, and NOT PARTIBLE. The

became hereditary*, and is well known at this day (though by several names) in most countries.

Feuds were afterwards extended beyond the life of the first vassal, or feudal tenant, to his sons or one of them, whom the lord should name †; but in such case the feudal donation ‡ was not extended beyond the words by any presumed intent, but was taken strictly §; insomuch that if the donation was to a man and his sons, all the sons succeeded *in capita*; and if one of them died, his part did not descend to his children, or survive to his brothers, but returned to the lord||. The reason for such a restriction in the mode of descent, should seem to be, that as the personal ability of the feudatory to perform the duties of the fief, was the motive of the grant, added to the obligation under which his fealty laid him to educate his offspring in a full sense of obedience to his lord, and with fit qualifications for his service in war—that, therefore, the fief was not permitted to go to the collateral relations of the first feudatory, whom he could not bind by his acts, and over whose education he had no influence.—Though, therefore, it is evident, that where, in the original grant, there were no particular directions to

* Thus in Germany, the old acknowledgment was continued by an express provision in the constitution, by which feuds were made hereditary, viz. *Servato usu majorum valvasorum in dandis equis et armis suis senioribus*. Vide Feud. lib. 1. tit. 1. et *Leges Longobard.* lib. 3. tit. 8. sect. 4.

† Sic progressum est ut ad filios deveniret, in quem (scilicet) dominus hoc vellet beneficium confirmare. Feud. lib. 1. tit. 1. Proindeque receptum ut ad eos vasalli filios quibus id beneficii feudi dominus concessisset deveniret, et postmodum temporis tractu inductum est ut ad omnes vasalli filios masculos intestata feudi successio æqualiter pertineat. Hanneken de jure feud. 139. Schilt. Cod. de nat. succ. feud. cap. 1. § 5. They were rendered hereditary first in the direct line—then in the collateral, and at last in the female line. *Leg. Longob.* lib. 3. tit. 8. Du Cange voc. *beneficium*.

‡ Though the feudists have generally considered feuds as mere donations, yet Mr. Somner (*Treat. of Gov.* 111.) says, that the feudal grant, in respect of the incident services, is improperly called a donation, being but *feudalis dimissio*, i. e. a demise in fee; but still the feudists properly enough called it a donation. First, because it was not originally supposed to be made for any immediate or contracted equivalent; and the services were rather consequences of the relation arising from the feud or the general feudal policy, then immediate returns, in consideration of the feud

or benefit conferred by the lord; and thus Grotius must be understood, when he says (in his treatise *De Jure Belli et Pacis*, lib. 2. cap. 12. sect. 5.) that in *feudali contractu rei feudalis concessio beneficium est, pactio autem militaris operæ pro tutela est, facio ut facias*. Secondly, because as the lord had the free choice of his vassal, and conferred the feud on whom he pleased, and the services of the feud were not so much calculated for the particular advantage of the lord, as for the defence of the community united under a feudal policy; the preference given, and interest moving from the lord, was a benefit conferred in such a manner, that, in respect to the lord, it might very well be called a donation: et licet, says Crag. (*de jure feud.* 42.) feuda aliter hodie comparentur, interveniente sæpissime pretio, aut alia re pro pretio denominatio tamen sit ab eo quod prævalet. —Et quanquam pretio interveniente, tamen justum pretium nunquam numerasse præsumitur, qui se fidelitatis et obsequii vinculo alii astringit; vinculum enim hoc obsequii pro parte pretii est: itaque feudum liberum et gratuitam donationem definimus ad illud quod fieri debet attendentes, non ad id quod in hoc corrupto sæculo apud degeneres homines in usu frequenti videmus.

§ Feudum ex sua natura est species quædam dominationis, et æquum est ut omnes donationes sint stricti juris, ne quis plus donasse præsumatur, quam in donatione expresserit. Crag. *de jure feud.* 50.

|| Crag. *de jure feud.* 21. 22.

lands that are partible, are valvasories, burgages, and such like, which are much of the nature of our socage lands ; these descend

guide the descent, the descendants of the first acquirer, and none others, were admitted, yet if it was not otherwise particularly expressed, the collaterals succeeded ; because, as it is conceived, the merit of their blood was part of the consideration ; not so properly in the right of heirs, as by way of remainder, under the original charter or grant. Dalrym. on Feud. Prop. c. 5. s. 1.

It is no easy matter to fix the precise time when each of these changes took place. M. l'Ab. Mabry conjectures, with some probability, that Charles Martel first introduced the practice of the grants for life—*Observat. tom. 1. p. 103, 160* ; and that Louis le Debonnaire was among the first who rendered them hereditary, is evident from the authorities to which he refers ; *Id. 429*. Mabillon however has published a *plactum* of Louis le Debonnaire, A. D. 860. by which it appears, that he still continued to grant them only during life. *De Re Diplomatica, l. 6. p. 353*. In the year 889, Odo king of France, granted lands to Ricabodo *fidei suo juri beneficiario et fructuario*, during his own life, and if he should die, and a son should be born to survive him, that right was to continue during the life of his son. Mabillon *ut supra, p. 556*. This was an intermediate step between fiefs merely during life, and fiefs hereditary to perpetuity. While they continued under the first form, and were held only during pleasure, he who granted them not only exercised the *dominium* or prerogative of superior lord, but retained the property, giving his vassal only the *usufruct*. But under the latter form, when they became hereditary, although the feudal lawyers continued to define a fief agreeably to its original nature, yet the property, in effect, was taken out of the hands of the superior lord, and lodged in those of the vassal.

In process of time, grandchildren succeeded to sons, and brothers to brothers *, if the *feud* was *antiquam aut paternum*, that is, not newly purchased, but came to the brother by descent from his father : but if the *feud* was what the feudists call *novum*, that is, newly purchased or acquired by a brother, a brother was not permitted to succeed to it, unless it was by virtue of an express provision in the constitution of the *feud* †.

At length, however, not only descendants in the direct line succeeded in *infinitum*, but collaterals also, without regard to their degree, provided they were descended from, and were of the blood of the first feudatory ‡.—See an excellent book on this subject, “An Introduction to the Law of Tenures,” written

* Postremo vero lege a Conrado imperatore promulgata (*Feud. lib. 5. tit. 1.*) ad nepotes ex filiis masculis hoc ipsum productum fuit. Hænneton de jure feud. 139, 140. Cum vero Conradus Romam proficisceretur petiit ut est a fidelibus, qui in ejus erant servitio, ut lege ab eo promulgata, hoc etiam ad nepotes ex filio producere dignaretur, et ut frater fratri sine legitimo hærede defuncto in beneficio quod eorum patris fuit, succedat. *Feud. lib. 1. tit. 1. 19. lib. 5. tit. 1.* Spelm. Posthumous Treatise of Feuds, 4. Crag. de jure feud. 21, 22.

† *Feud. lib. 1. tit. 1. 8. 14. 20. lib. 2. tit. 12. 90.*—Crag. de jure feud. 22. 163. 242.

‡ Tandem factum est ut feuda non solum ad descendentes in perpetuum transirent, sed etiam ut ad collaterales, qui ex primo vasallo descendebant, in infinitum continuarentur. Crag. de jure feud. 22, 50, 242, 243, 244. *Feud. lib. 1. tit. 1.* Schilt. de nat. succession. cap. 1. sect. 8. Spelm. Posthum. Treatise of Feuds, 4, 5. Zafius in usus feud. 46.

to ALL the sons, or to all the daughters. Lands NOT partible, are **FIEFS AND DIGNITIES**.—They descend to the **ELDEST SON**, and not to all the sons; but if there be NO sons, then to all the daughters, and become partible.

The rules and directions of their descents are as follow, viz.

First, for want of sons or nephews, it descends to the daughters; if there be no sons or daughters, or descendants from them, it goes to brothers; and for want of brothers, to sisters;—observing, as before, the difference between lands partible and not partible.—And accordingly the descent runs to the posterity of brothers TO THE SEVENTH DEGREE. If there be no brothers, nor sisters, nor any descendants from them WITHIN the seventh degree, IT DESCENDS TO THE FATHER; and if the father be dead, then to the uncles and aunts, and their posterity (as above is said

by sir Martin Wright. Also the first volume of the History of the Emperor Charles the Fifth, by Dr. Robertson. Each of these books in a clear, and the latter in an elegant manner, deduces the origin, and elucidates the principles of the feudal system. To these may be added Blackstone's tract on the Law of Descents. Mr. Hume, in his History of England, has slightly, but ingeniously, touched the subject. Gilbert's Treatise upon Tenures, and Dalrymple's Essay on Feudal Property, deserve attention. There is also an ingenious "Discourse concerning the Law of Inheritances in Fee Simple,"—written by Mr. R. Robinson.—Though it cannot be denied, but this "Discourse" places the author in a very respectable point of view, yet it must be confessed, that by attending too much to a favourite system, he is less intelligible than otherwise he would have been.—Sullivan's "Lectures on the Feudal Law, and the Constitution and Laws of England," is a publication of merit, from whence may be derived much necessary information. And see also Hallam's View of the Middle Ages, c. 8.—With these valuable writings, I would recommend a very ingenious and laborious *chart*, published by the late Mr. Fearn.—He styles it "An Historical Legigraphical Chart of Lauded Property in England, from the time of the Saxons;" the manifest intent of it being "to distinguish in a manner immediately obvious to sight, the several tenures, as well as the mode of descent, and powers of alienation of lands in England, with the several alterations they have incurred during a course of more than 700 years."

As to the preference of the eldest son to the feud, see Wright's Ten. 175.—And why males were preferred to females, *Id.* 179. and Sulliv. Lect. xiv. And as to the exclusion of the father from any possibility of succeeding to the son's inheritance, as such, see Wright's Ten. 180. and Blac. Com. 2 v. 212. It is somewhat singular, that in tracing the great lines of the Mexican constitution, an image of feudal policy, in its most rigid form, rises to view.—Its spirit and principles seem to have operated in the new world, in the same manner as in the ancient. Dr. Roberts. Hist. Amer. 2 v. 280.

in the case of brothers and sisters); and if there be none, then to the grandfather.

So that, according to their law, the father is POSTPONED to the brother and sister, and their issues, but is PREFERRED before the uncle. According to the Jewish law, the father is preferred before the brother;—by the Roman law, he succeeds together equally with the brother;—but by the English law, the father CANNOT take from his son by an IMMEDIATE descent, but may take AS HEIR TO HIS BROTHER, who was heir to his son by collateral descent.

Secondly, if lands descended from the part of the father, they could never resort, by a descent, to the line of the mother. But in case of purchases BY THE SON who died without issue, for want of heirs of the part of the father, it descended to the heirs of the part of the mother, according to the law of England.

Thirdly, the son of the ELDEST son, who died in the life of the father, is preferred before a YOUNGER son, SURVIVING his father, as the law stands here now settled; though it had some interruption 4 *Johannis* (a).

Fourthly, on equality of degrees, in collateral descents, the male line is preferred before the female.

Fifthly, although by the civil law,—*fratres ex utroque parente conjuncti preferuntur fratribus consanguineis tantum vel uterinis*;—yet it should seem by the *Coutumier* of Normandy,—*fratres consanguineis ei ex eodem patre sed diversa matre*,—shall take by descent, together with the brothers, EX UTROQUE CONJUNCTI, upon the death of any such brothers. But *quære* hereof, for this seems a mistake. For, as I take it, the half blood HINDERS THE DESCENT between brothers and sisters, by their laws, as well as ours.

Sixthly, LERROSY was amongst them, an impediment of succession. But then it seems it ought to be first solemnly adjudged so by the sentence of the Church (b).

Upon all this, and much more that might be observed upon the customs of several countries, it appears, that the rules of successions, or hereditary transmissions, have been various in several countries, according to their various laws, customs, and usages.

(a) Post 316. Blac. Com. 2 vol. by which the priests, among the Jews, judged of the leprosy, see Levit. c. 13.

(b) See post 315. 317. For the rules and 14. St. Matt. c. 8. Lu. c. 17.

And now, after this brief survey of the laws and customs of other countries, I come to the laws and usages of England in relation to descents; and the growth that those customs have successively had, and whereunto they are now arrived.

First, touching hereditary successions. It seems, that according to the ancient British laws, the eldest son inherited **THEIR EARLDOMS AND BARONIES**; for they had great dignities and jurisdictions annexed to them, and were in nature of principalities; but that their **ORDINARY FREEHOLDS**, descended to **ALL** their sons. And this custom they carried with them into Wales, whither they were driven. This appears by *Statutum Wallie*, 12 E. I. and which runs thus, viz.

“ Aliter usitatem est in Wallia quam in Anglia quoad successionem hæreditatis; eo quod hæreditas partibilis est inter hæredes masculos, & a tempore cujus non extiterit memoria partibilis extitit. Dominus rex non vult quod consuetudo illa abrogetur; sed quod hæreditates remaneant partibiles, inter consimiles hæredes, sicut esse consueverunt: & fiat partitio illius sicut fieri consuevit. Hoc excepto bastardi non habeant de cætero hæreditates & etiam quod non habeant purpartes, cum legitimis nec sine legitimis” (a).

Whereupon three things are observable, viz. first, that at this time, the hereditary succession of the eldest son was then **KNOWN** to be the common and usual law in England. Secondly, that the succession of all the sons, was the ancient **CUSTOMARY LAW** among the British in Wales, which by this statute was continued to them. Thirdly, that before this time, bastards were admitted to inherit in Wales, as well as the legitimate children; which custom is thereby abrogated. And although we have but few evidences, touching the British laws before their expulsion hence into Wales, yet this usage in Wales, seems sufficiently to evidence **THIS** to have been the ancient British law (E).

(a) See cap. ix. and note (B) on that chapter.

(E) In the ancient British States, where the whole riches of the people consisted in their herds, the laws of succession were few and simple. The cattle of the deceased were divided equally among his sons; if no sons, among his daughters; and if he left no children, among his nearest relations. This was also the rule of succession among the ancient Germans. These nations seem to have had no idea of the rights of primogeniture, or that the eldest son had

Secondly, as to the times of the Saxons and Danes. Their laws, collected by Brompton and Lambard, speak not much concerning the course of descents: Yet it seems that COMMONLY, descents of their ORDINARY lands at least, except baronies and royal inheritances, descended also to ALL the sons (a). For amongst the laws of king Canutus, in Mr. Lambard (b), is this law, viz. No. 68. "Sive quis incuria sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hereoti nomine) sibi assumpto. Verum eas judicio suo uxori, liberis & COGNATIONE PROXIMIS juste (pro suo cuique jure) distributio."

Upon which law, we may observe these five things, viz.

(a) Blackstone says, that the Danes the very law of Canute which Hale seem to have made no distinction of has transcribed. *Blac. Com.* 2 v. 215. exes, but to have admitted all the Hale says the same in his fourth observation on this law. children at once to the inheritance; and, in support of the assertion, cites (b) *Fo.* 122, 123.

any title to a larger share of his father's effects than the youngest*. This rule of division was so inviolably observed by the Germans, and probably by the Britons, that the father, by his will, could not make any other distribution. The laws of succession were much the same in those British States where the lands were divided and cultivated. The lands did not descend to the eldest son, but were equally divided among all the sons; and when any dispute arose about the division, it was determined by the Druids. This law or custom (which was afterwards known by the name of Gavelkind) was observed for ages, among the posterity of the ancient Britons†. It appears plainly in the laws of Hoel Dha, king of Wales in the 10th century. At that time, indeed, the clergy were labouring hard to introduce the doctrine of the common law, which favoured the right of primogeniture; but the municipal laws of Wales were still in favour of the ancient custom. By the ecclesiastical law none succeed to the father in his estate, but his eldest son, lawfully begotten. By the laws of Hoel Dha, it is decreed, that the youngest shall have an equal share of the estate with the eldest‡. Nay, in other parts of these laws, which settle the manner in which estates were to be divided, it appears that the youngest son was more favoured than the eldest, or any of his brothers. "When the brothers have divided the father's estate amongst them, the youngest brother shall have the best house, with all the office houses; the implements of husbandry, his father's kettle, his ax for cutting wood, and his knife. These three last things the father cannot give away by gift, nor leave by his last will, to any but his youngest son; and if they are pledged, they shall be redeemed"§.

* Tacit. de Mor. German. c. 20.

† Caesar. de Bell. Gall. l. 6. c. 13.

‡ Leges Wallie, l. 11. c. 17. p. 149.

§ Ibid. l. 11. c. 12. p. 139.—Dr. Henry's Hist. vol. i. p. 222.

First, that the wife had a share, as well of the lands, for her dower, as of the goods.

Secondly, that, in reference to hereditary successions, there then seemed to be little difference between lands and goods ; for this law makes no distinction.

Thirdly, that there was a kind of settled right of succession, with reference to proximity and remoteness of blood, or kin,—*et cognatione proximis pro sui cuique jure*.

Fourthly, that, in reference to children, THEY ALL SEEMED TO SUCCEED ALIKE, without any distinction between males and females.

Fifthly, that yet the ancestor might dispose of, BY HIS WILL, as well lands as goods ; which usage seems to have obtained here unto the time of Henry II. as will appear hereafter. *Vide Glanville*.

Thirdly, it seems that, until the Conquest, the descent of lands was at least to ALL the sons alike ; and, for aught appears, TO ALL THE DAUGHTERS ALSO : and that there was NO difference in the hereditary transmission of lands and goods, at least in reference to THE CHILDREN (a). This appears by the laws of king Edward the Confessor, confirmed by king William I. and recited in Mr. Lambard, folio 167, as also by Mr. Selden in his notes

(a) The law of the Saxons on the continent, (which was probably brought over hither, and first altered by the law of Canute,) gives an evident preference of the male to the female sex. "Pater aut mater defuncti filio non filie hæreditatem relinquunt....Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertinet." Tit. 7. sect. 1. 4. It is possible therefore, in the opinion of Mr. justice Blackstone, that this preference might be a branch of that imperfect system of feuds, which obtained here before the Conquest ; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the First, it is not, (like many Norman innovations) given up, but rather enforced. The true reason (continues the learned commentator) of preferring the males must be deduced from feudal principles : for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as

they were incapable of performing those military services, for the sake of which that system was established. Blac. Com. 2 v. 214. For the true distinction between proper and improper feuds, see Wright's Ten. cap. 1. *passim*. The succession of all the sons equally to the father, was not only the ancient feudal law, but, as it should seem, the law of England in the time of the Saxons ; the relics of which remain in the gavelkind of Kent. Sulliv. Lect. XIV. and see Robinson's Treat. on Gavelkind, which is an elaborate dissertation on the origin, antiquity and universality of partible descents. The author purveys his subject amongst the Jews, the Greeks, and the Romans, afterwards amongst most of the modern nations in Europe, and then proceeds to inquire into the state of our own law of descents anterior to the Conquest. For the etymon of gavelkind, and the properties of this species of tenure, see Wright's Ten. 207, &c.

upon Eadmerus, viz. *Lege 36. tit. De Intestatorum Bonis*, page. 184.—“Si quis intestatus obierit, liberi ejus hæreditatem æquæ—*liter dividunt*” (F).

(F) The laws of our Anglo-Saxon ancestors, directed and regulated the succession of property, in a manner very agreeable to the natural wishes and desires of mankind. When a father died and left children, they were his heirs, as being dearest unto him, and most dependent upon him*. If the children were all sons, the possessions of their common parent were equally, or almost equally, divided amongst them. If they were all daughters, the division was also equal. But when some were sons, and others daughters, it is not certainly known whether the daughters shared equally with the sons or not, in the most ancient times. By the laws of the Saxons on the continent, daughters did not share equally with sons; and this, it is probable, was also the law of those who settled in this island†; though the law of Canute seems to make no distinction between sons and daughters‡. By the laws of Wales in the tenth century, a daughter received only half the proportion which a son inherited of the father's possessions§. When a man at his death had no children, his nearest relations were his heirs; which are thus described: “If any one die without children, if his father and mother be alive, they shall be his heirs; if his father and mother are dead, his brothers and sisters shall be his heirs; but if he hath no brothers or sisters, the brothers and sisters of his father and mother shall be his heirs; and so on to the fifth degree, according to proximity of blood||.” When none appeared to claim a succession, or when they could not make good their claim, the whole fell to the king. Such were the laws of succession, among our Anglo-Saxon ancestors; different in several respects from those which are observed at present, and which were introduced, with many other feudal customs, after the Norman Conquest.

Though these rules of succession seem agreeable to the most natural feelings of the human heart, yet it might often happen, that persons who had no children, or very near relations, might wish to dispose of their possessions, to others than those who were pointed out by the law. But this the ancient Germans could not do, because they were strangers to the use of wills and testaments; as probably the Anglo-Saxons were, at their first settlement in this island¶. Those German and northern nations, however, who abandoned their native soils, and founded kingdoms in Italy, France, Spain and Britain, soon became acquainted with, and adopted this method of conveying their estates, which they found practised by the Romans, and other inhabitants of these countries. After the conversion of these nations to Christianity, they were instructed and encouraged in this mode of eluding the strict laws of succession, and conveying their estates by will, for very obvious reasons. Accordingly, we may observe, that the most ancient Anglo-Saxon testaments, which have been preserved and published, are agreeable to the Roman forms, and contain very valuable legacies to the Church, for the benefit of the souls of the testators, and of their ancestors**. The method of dis-

* Tacit. de Mor. Germ. c. 20.

† Lindenbrog. p. 476.

‡ Wilkins' *Leges Saxon.* p. 144.

§ *Leges Walliæ*, p. 88.

|| Tacit. de Mor. Germ. c. 20. Linden-

brog. p. 460. Wilkins' *Leges Saxon.* p. 266.

¶ Tacit. de Mor. Germ. c. 20.

** Hiccesti dissertatio epistolæ, p. 50—63.

But this equal division of inheritances among all the children was found to be very inconvenient. For,

First, it weakened the strength of the kingdom; for by frequent parcelling and subdividing of inheritances, in process of time they became so divided and crumbled, that there were few persons of **ABLE** estates left to undergo **PUBLIC** charges and offices.

Secondly, it did by degrees bring the inhabitants to a low kind of country living: and **FAMILIES WERE BROKEN**. And the younger sons, which, had they not had those little parcels of

posing of their possessions by will, agreeable to their inclinations, and for the good of their souls, which was first adopted by kings and great men, soon became so common, and so fatal to the interests of legal heirs, that it was found necessary to lay it under some restraints by positive laws. By a law of Alfred the Great, all persons were restrained from alienating from their natural and legal heirs, estates which had descended to them from their ancestors, if the first purchasers had directed either in writing, or before credible witnesses, that the estates should remain in the family, and descend to their posterity; which sufficiently proves, that entails are very far from being novelties in the laws of England*. A man who had children, was prohibited, by the laws of Wales, from leaving any legacies from his children, except a mortuary to the Church, or a sum of money for the payment of his debts†. But as the ignorance and superstition of the people, the influence and avarice of the clergy increased,—entails, and all other legal restraints, which had been contrived to prevent men from ruining their families to enrich the Church, were removed, and every man was encouraged to leave as much to the Church as possible. “The
“thirteenth cause,” says Muratori, “of the great riches of the Church, was
“the pious manners of those ancient times, when Fathers and Councils earnestly exhorted all Christians to give, or at least to leave by their testaments, a
“great proportion of their estates for the redemption of their souls; and those
“good men who complied with these exhortations, were said to have made
“Christ one of their heirs. By degrees, there was hardly any man died, without leaving a considerable legacy to the Church; and if any person neglected
“to make a will and do this, he was esteemed an impious wretch, who had no
“concern for the salvation of his soul, and his memory was infamous. To wipe
“off this infamy, it insensibly became a custom for the bishop to make will
“for all who died intestate in his diocese, and to leave as much to the Church,
“as the persons themselves should have done, if they had made wills. This
“good office (as I imagine) was at first done with the consent, and perhaps at
“the request, of the heirs of the deceased; but in process of time it became
“an established custom, and acquired the force of a law, particularly in England‡.” Is it possible, that presumption on the one hand, and simplicity on the other, could be carried to a greater height §?

* Wilkins' *Leges Saxon.* p. 43.

† *Leges Walliæ*, p. 76.

‡ Muratori. *Antiq.* t. 5. p. 654.

§ *Hen. Hist.* 2 v. 283. seq.

land to apply themselves to, would have betaken themselves to trades, or to civil or military, or ecclesiastical employments (a), neglecting those opportunities, wholly applied themselves to those small divisions of lands; whereby they neglected the opportunities of greater advantage, of enriching themselves and the kingdom.

And therefore king William I. having by his accession to the crown, gotten into his hands, the possessions and demesnes of the crown, and also very many and great possessions of those that opposed him, or adhered to Harold,—disposed of those lands, or great part of them, to his countrymen, and others that adhered to him; and reserved certain honorary tenures, either by baronage, or in knight's service, or grand serjeancy (b), FOR THE DEFENCE OF THE KINGDOM; and possibly also even at the desire of many of the owners, changed their former tenures into knight's service. Which INTRODUCTION OF NEW TENURES, was nevertheless not done WITHOUT CONSENT OF PARLIAMENT; as appears by the additional laws before mentioned; which king William made by advice of parliament, mentioned by Mr. Selden in his notes on Eadmerus, page 191, amongst which this was one, viz.

“Statuimus etiam & firmiter præcipimus ut omnes comites
“barones milites & servientes & universi liberi homines totius
“regni nostri habeant & teneant se semper in armis & in equis ut
“debet & oportet, & quod sint semper prompti & bene parati ad
“servitium suum integrum nobis explendum & peragendum,
“cum semper opus fuerit, secundum quod nobis de feodis debent
“& tenentur tenementis suis de jure facere & sicut illis statuimus
“per commune concilium totius regni nostri, et illis dedimus &
“concessimus in feodo jure hæreditario.”

Whereby it appears, that there were two kinds of military provisions; one that was set upon all freeholds by common consent of parliament, and which was usually called *ASSISA ARMORUM*; and another that was conventional, and by tenure, UPON THE INFREUDATION OF THE TENANT, and which was usually called knight's service; and sometimes royal, sometimes foreign service, and sometimes *servitium lorice*.

(a) These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this con-

dition the feudal constitution was established in England by William the Conqueror. *Blac. Com.* 2 v. 215.

(b) See Wright's *Tenures*, Sulliv. Lect. and note (K) on chapter v.

And hence it came to pass, that not only by the customs of Normandy, but also according to the customs of other countries, those HONORARY fees, or infeudations, became descendible to THE ELDEST, and not to all the males. And hence also it is, that in Kent—(where the custom of ALL THE MALES taking by descent generally prevails, and who pretend a concession of all their customs by the Conqueror, to obtain a submission to his government, according to that romantic story of their moving wood)—even in Kent itself, those ANCIENT tenements or fees that are held ANCIENTLY by KNIGHT'S SERVICE, are descendible to the ELDEST SON; as Mr. Lambard has observed to my hands, in his Perambulation, page 533, 553. out of 9 Hen. III. Fitz. Prescription, 63. 26 Hen. VIII. 5 and the statute of 31 Hen. VIII. cap. 3. And yet even in Kent, if gavelkind lands escheat, or come to the crown by attainder or dissolution of monasteries, and be granted to be held by knight's service, or *per baronium*,—the customary descent is NOT changed; neither can it be, but by act of parliament; for it is a custom FIXED TO THE LAND.

But those honorary infeudations made in ancient times, especially shortly after the Conquest, did SILENTLY AND SUDDENLY ASSUME THE RULE OF DESCENTS TO THE ELDEST, and accordingly held it. And so, although possibly there were no acts of parliament of those elder times, at least none that are now known of, for altering the ancient course of descents from all the sons, to the eldest, yet the use of the neighbouring country might introduce the same usage here, as to those HONORARY possessions.

And because those honorary infeudations were many, and scattered almost through all the kingdom, in a little time they introduced A PARITY, in the succession of lands of OTHER tenures; as socages, valvasories, &c. So that without question, BY LITTLE AND LITTLE, almost generally in all counties of England, (except Kent, who were most tenacious of their old customs, in which they gloried;—and some particular feuds and places where a contrary usage prevailed,) the generality of descents or successions, by little and little, AS WELL OF SOCAGE LANDS AS KNIGHT'S SERVICE, went to the ELDEST son, (a) according to the declaration of king Edward I. in the statute of Wales above mentioned; as will more fully appear by what follows.

(a) See Wright's Ten. 49, 175. 215, and cap. 5. of this Hist. Sull. Lect. xiv. Blac. Com. 2 v. 214,

In the time of Henry I.—as we find by his seventieth law, it seems that the whole land did NOT descend to the eldest son, but begun to look a little that way, viz. *PRIMUM PATRIS FEUDUM PRIMOGENITUS FILIUS HABEAT*. And as to collateral descents, that law determines thus. “*Si quis sine liberis decesserit pater aut mater ejus in hæreditatem succedat, vel frater vel soror si pater & mater desint; si nec hos, habeat soror patris vel matris, & deinceps in quintum geniculum; qui cum propinquiores in parentela sint hæreditario jure succedant; & dum virilis sexus extiterit & hæreditas ab inde sit, foeminea non hæreditetur*” (a).

By this law it seems to appear;

First, the eldest son, though he had *jus primogenituræ*, the principal fee of his father's land, yet he had not ALL the land.

Secondly, that for want of children, the father or mother inherited before the brother or sister.

Thirdly, that for want of children, and father, mother, brother, and sister, the land descended to the uncles and aunts TO THE FIFTH GENERATION.

Fourthly, that in successions collateral, PROXIMITY of blood was preferred.

Fifthly, that the male was preferred before the female, i. e. the father's line was preferred before the mother's, UNLESS THE LAND DESCENDED FROM THE MOTHER, and then the mother's line was preferred.

How this law was observed in the interval between Henry the First and Henry the Second, we can give no account of. But the next period that we come to is, the time of Henry II. wherein Glanville gives us an account how the law stood at that time. Vide Glanville, lib. 7. Wherein, notwithstanding it will appear, that there was some UNCERTAINTY AND UNSETTLEDNESS IN THE BUSINESS OF DESCENTS, or hereditary successions, though it was much better polished then formerly, the rules THEN of succession were either in reference to goods, or lands.

As to goods, one thjrd part thereof went to the wife, another third part went to the children, and the other third was left to the disposition of the testator. But if he had no wife, then a moiety went to the children, and the other moiety was at the deceased's disposal. And the like rule if he had left a wife, but no children. Glanv. lib. 2. cap. 29. et lib. 7. cap. 5 (b).

(a) See cap. vii. and Lambard, ut supra.

(b) As to the distribution of intestates effects as now established in this

But as to the succession of lands, the rules are these.

First, if the lands were **KNIGHT'S SERVICE**, they generally went to the **ELDEST SON**; and in case of no sons, then to **ALL** the daughters; and in case of no children, then to the eldest brother.

Secondly, if the lands were **SOCAGE**, they descended to **ALL** the sons to be divided; (*a*) **SI FUERIT SOCCAGIUM ET ID ANTIQUITUS DIVISUM**. Only the chief house was to be allotted to the purparty of the eldest, and a compensation made to the rest in lieu thereof.—“*Si vero non fuerit antiquitus divisum, tunc primogenitus secundum quorundam consuetudinem totam hæreditatem obtinebit, secundum autem quorundam consuetudinem postnatus filius hæres est.*” Glanville, lib. 7. cap. 3. So that although **CUSTOM** directed the descent **VARIOUSLY**, either to the eldest, or youngest, or to **ALL** the sons, yet it seems that at this time, *jus commune*, or common right, spoke for **THE ELDEST SON TO BE HEIR**, no custom intervening to the contrary.

Thirdly, as the son or daughter, so **THEIR** children, *in infinitum*, are **PREFERRED** in the descent, before the collateral line, or uncles.

Fourthly, but if a man had two sons, and the eldest son died in the life-time of his father, **HAVING ISSUE** a son or daughter, and then the father dies; **IT WAS THEN CONTROVERTED**, whether the son or nephew should succeed to the father; though **THE BETTER OPINION** seems to be for the **NEPHEW**. Glanvil. lib. 7. cap. 3.

Fifthly, a bastard could not inherit. Glanv. lib. 7. cap. 13, or 17. And although by the canon or civil law, if *A.* have a son **BORN** of *B.* **BEFORE** marriage, and after *A.* marries *B.*—**THIS SON SHALL BE LEGITIMATE AND HERITABLE**; yet according to the laws of England then, and ever since used, he was **NOT** heritable. Glanvil. lib. 7. cap. 15.

Sixthly, in case the purchaser died without issue, the land descended to the brothers; and for want of brothers, to the sisters;

kingdom, see 22 and 23 Car. 2. c. 10. 1 Jac. 2. c. 17. Blac. Com. 2 v. 515. 4 v. 408, 424, 439. and a chart illustrative of the subject, published by Mr. Ed. Parker.

(*a*) It is mentioned in the Mirror, as a part of our ancient constitution, that knights fees should descend to the

eldest son, and socage fees should be partible among the male children. Mir. c. 1. sect. 3. and Lord Lyt. Hist. Hen. II. For the definition of a knight's fee, see Sulliv. Lect. p. 188. As to socage, see Somner's Treat. of Gavel. 133, 141. Wright's Ten. 142. and Blac. Com. 2 v. 79. 4 v. 419.

and for want of them, to the children of the brothers or sisters; and for want of them, to the uncles; and so onward ACCORDING TO THE RULES OF DESCENTS AT THIS DAY: and the father or mother were NOT to inherit to the son, but the brothers or uncles, and THEIR children. Glanv. lib. 7. cap. 1 & 4.

And it seems, that in all things else, the rules of descents, in reference to the collateral line, were MUCH THE SAME AS NOW. As namely, that if lands descended of the part of the father, it should NOT resort to the part of the mother, or *è converso* (a). But in the case of PURCHASERS for want of heirs of the part of the father, IT RESORTED TO THE LINE OF THE MOTHER. And the nearer and more worthy of blood were preferred. So that if there were any of the part of the father, though never so far distant, it hindered the descent to the line of the mother, though much nearer.

But in those times it seems there were two impediments of descents, or hereditary successions, which do NOT NOW obtain, viz.

First, leprosy; if so adjudged by sentence of the Church. This indeed, I find not in Glanville; but I find it PLEADED AND ALLOWED in the time of king John; and thereupon the land was adjudged from the leprous brother, to the sister. *Pasch. 4 Johannis* (b).

Secondly, there was another curiosity in law, and it was wonderful to see how much and how long it prevailed. For we find it in use in Glanville, who wrote *temp. Henry II.*—(c) in Bracton, *temp. Henry III.*—in Fleta, *temp. Edward I.* and in the broken year of 13 Edward I. Fitzh. Avowry, 235.—“*Nemo potest esse tenens & dominus, & homagium repellit perquisitum.*”—And therefore if there had been THREE brothers, and the eldest brother had enfeoffed the second, RESERVING HOMAGE,—AND RECEIVED HOMAGE, and then the second had died without issue;—the land should

(a) But the line of descent may be broken;—as, for instance, one seised in fee of a copyhold of inheritance by descent, *ex parte materna*, surrendered the same to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint,—remainder in default of appointment, to himself to fee;—after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who,

upon re-payment of the principal and interest, surrendered again to the mortgagee.—It was held that the line of descent was thereby broken, and that the estate descended to the *paternal heir*. *Harman v. Morgan*, 7 T. R. 103. So a feoffment and refoffment break the line of descent. *Id.* 105.

(b) See ante 305, post 317.

(c) His treatise *De Legibus Angliæ* was composed about 1180.

have descended to the YOUNGEST brother, and not to the eldest brother, *quia homagium repellit perquisitum*, as it is here said : for he could not pay homage to himself. Vide for this, Bracton, lib. 2. cap. 30. Glanvil. lib. 7. cap. 1. Fleta, lib. 6. cap. 1.

But at this day the law is ALTERED, and so it has been, for aught I can find, ever since 13 Edw. I.—Indeed, it is ANTIQUATED rather than altered, and the fancy upon which it was grounded has appeared trivial. For if the eldest son enfeoff the second, reserving homage, and that homage paid, and then the second son dies without issue, it will descend to the eldest AS HEIR, and the seigniority is extinct. It might indeed have had some colour of reason to have examined, “whether he might not have WAIVED the descent, in case his services had been more beneficial than the land.”—But there could be little reason from thence to exclude him from the succession. I shall mention no more of this impediment, nor of that of leprosy, for that they both are vanished and antiquated long since. As the law now is, NEITHER OF THESE ARE ANY IMPEDIMENT OF DESCENTS.

And now, passing over the time of king John and Richard I.—because I find nothing of moment therein on this head ; unless the usurpation of king John upon his eldest brother's son, which he would fain have justified, by INTRODUCING a law of preferring the younger son before the nephew, descended from the elder brother : but this pretension could no way justify his usurpation, as has been already shewn in the time of Henry II. (a)—next, I come to the time of Henry III. in whose time the tractate of Bracton was written. And thereby (in lib. 2. cap. 30. & 31. and lib. 5.) it appears, that there is so little variance, as to point of descents, between the law as it was taken when Bracton wrote, and the law as afterwards taken in Edward the First's time, when Britton and Fleta wrote, that there is very little difference between them ; as may easily appear by comparing Bracton *ubi supra*, & Fleta, lib. 5. cap. 9. lib. 6. cap. 1, 2. The latter seem to be only transcripts, or abstracts of the former. Wherefore I shall set down the substance of what both say, and thereby it will appear, that the rules of descents in Henry the Third, and Edward the First's time, were very much one.

First, at this time, the law seems to be unquestionably SETTLED, that the ELDEST son was, of common right, HEIR, not only in

(a) Ante page 305. See Blac. Com. 2 v. 220. Sulliv. Lect. xxxvi.

cases of knight service lands, but also of socage lands ; unless there were a special custom to the contrary, as in Kent and some other places. And so that point of the common law was fully settled (*a*).

Secondly, that all the descendants, *in infinitum*, from any person that had been heir, if living, were inheritable JURE REPRÆSENTATIONIS ; as the descendants of the son, of the brother, of the uncle, &c. And also,

Thirdly, that the eldest son dying in the life-time of the father, HIS son, or issue, was to have the preference AS HEIR, to the father, before the younger brother ; and so the doubt in Glanville's time was settled. Glanvil. lib. 7. cap. 3. " Cum quis autem moriatur habens filium postnatum, & ex primogenito filio præmortuo nepotem, magna quidem juris dubitatio solet esse uter illorum preferendus sit alii in illa successione, scilicet, utrum filius aut nepos ? "

Fourthly, the father or grandfather could not by law inherit IMMEDIATELY to the son.

Fifthly, leprosy, though it were an exception to a plaintiff, because he ought NOT to converse in the courts of law, (as Bracton, lib. 5. cap. 20.) yet we nowhere find it to be an *impediment* of a descent (*b*).

So that, upon the whole matter, for any thing I can observe in them, the rules of descents THEN stood settled in ALL points, as they are AT THIS DAY ; except some FEW matters, which yet were soon after settled, as they now stand, viz.

First, that impediment or hindrance of a descent from him that did homage, to him that received it, seems to have been yet in use ; at least till 13 Edw. I. and in Fleta's time, for HE puts the case and ADMITS it.

Secondly, whereas both Bracton and Fleta agree, that HALF BLOOD to him that is a PURCHASER, is an impediment of a descent ; yet in the case of a descent from THE COMMON ANCESTOR, half blood is NO impediment. As for instance—*A.* has issue *B.* a son and *C.* a daughter by one venter, and *D.* a son by another venter : if *B.* purchases in fee and dies without issue, it shall descend to the sister, and not to the brother of the half blood. But

(*a*) Black. Com. 2 v. 215.

(*b*) Hale, however should seem to say the contrary, ante 305. and 315. But whether leprosy, were or were not, an *impediment* to a descent, yet it

did not incur a forfeiture ;—the misfortune did not operate as a crime. Brac. l. 5. c. 20. See Fitzherbert, on the writ " de leproso amovendo,"—234. D.

if the land had descended from *A.* to *B.* and he had entered and died without issue, it was a doubt in Bracton and Britton's time, whether it should go to the younger son, or to the daughter? But the law is since settled, that IN BOTH CASES IT DESCENDS TO THE DAUGHTER:—"et seisinā facit stipitem & primum gradum. Et possessio fratris de feodo simplici facit sororum esse hæredem."

Thus upon the whole it seems, that abating those small and inconsiderable variances, the states and rules of descents as they stood in the time of Henry the Third, or at least in the time of Edward the First, were reduced to their full complement and perfection; and vary nothing CONSIDERABLY from what they are at this day, and HAVE CONTINUED EVER SINCE THAT TIME. (a)

I shall therefore set down the state and rule of descents in FREE-SIMPLE, as it stands at this day; without meddling with particular limitations of entails of estates, which VARY the course of descents, in some cases, from the common rules of descents, or hereditary successions. And herein we shall see what the law has been and continued, touching the same, ever since Bracton's time, who wrote in the time of Henry the Third, now above four hundred years since; and by that we shall see what alterations the succession of time has made therein.

And now to give a short scheme of the rules of descents, or hereditary successions, of the LANDS of subjects, AS THE LAW STANDS AT THIS DAY, and has stood for above four hundred years past, viz.

All possible hereditary successions may be distinguished into these three kinds; viz. either,

First, in the descending line, as from father to son or daughter, nephew or niece, i. e. grandson or granddaughter. Or,

Secondly, in the collateral line, as from brother to brother, or sister, and so to brother and sisters children. Or,

Thirdly, in an ascending line, either DIRECT, as from son to father, or grandfather, (which is NOT admitted by the law of England; (G) or in the TRANSVERSAL line, as to the uncle or aunt,

(a) If an estate *pur autre vie*, be limited in trust for a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir, as a *special* occupant, chargeable according to the statute of frauds. 29 Car.2. c. 3. But there can be no *general* occupancy of a copyhold, because the freehold is always in the lord. 4 T. R. 229. 7 T. R. 186. 5 T. R. 511.

(G) The reasons given for excluding lineal ascent are first, that fathers and mothers are not of the blood of their children; secondly, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and

great-uncle or great-aunt, &c. And because this line is again divided into the line of the father, or the line of the mother; this

thirdly, that it tends to avoid confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the *civil* law is said to be the occasion. 3 Co. 40, Ratcliff's case. Sir Edward Coke himself controverts the first of these reasons, by the words of Littleton in c. 1. sect. 3;* and by the case of administration, in which the father or mother is preferred as *nearest of blood* to their children; and also by the case of a remainder to the sons *nearest of blood*, under which description the father is entitled to take by purchase. But as to the two other reasons, Coke rather appears to adopt them. However, neither of them seem satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shewn, that it was promulgated as a law for mankind in *general*, instead of being, like many other parts of the Mosaic law, a rule for the direction of the Jewish nation *only*. Besides, by the Jewish law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Blackstone's Law Tracts, v. 1. p. 182, oct. ed. and Seld. de Success. Ebræor. c. 12. there cited. The argument from the supposed confusion and uncertainty which might arise, if lineal ascent should be permitted, is not less liable to objection; because lineal *ascent* might be governed by the same rules as lineal *descent*; and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our disallowance of lineal ascent in a very different way; and, according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates tail, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount to them, and also his collateral relations. How this rule in *practice* became extended, so as to exclude lineal ascent *universally*, without confining it to the cases to which the feudal reason for the rule is applicable, and yet at the same time is so construed, as to let in all collateral relations, and even the father himself collaterally, and by the medium of others, is not now very easy to explain; though even this has been attempted. See Wright's Tenures 180. and Blackstone's Law Tracts, v. 1. p. 183. oct. ed. See also a learned note on the subject, in Littleton, *avec Observat. par M. Houard*. This edition of Littleton is in 2 vol. quarto, and was published at Rouen in 1766.—Hargrave's edit. of Co. Lit. note 1. p. 11.

Bracton gives the following quaint reason for the exclusion of lineal ascent—“*Descendit itaque jus quasi ponderosum quod cadens deorsum recta linea vel transversali, et nunquam reascendit, &c.*”† This reason is also adopted by Sir Edward Coke.‡ Hence in the opinion of our ancient lawyers, the descent of lands was regulated according to the laws of gravitation. This reason has been long since exploded; and others, which have been drawn from the history of the rule itself, from the principles of the feudal system, are now admitted, as conclusive, on the subject. For which see Wright's Ten. 180. Sulliv. Lect. xiv. Blac. Com. 2 v. 208. and Hallam's View of Mid. Ages. The Saxons were

* Co. Lit. 11. a. b.

† L. 2. c. 29.

‡ 1 Inst. 11 a.

TRANSVERSE ASCENDING SUCCESSION, is either in the line of the father, grandfather, &c. ON THE BLOOD OF THE FATHER; or in the line of the mother, grandmother, &c. ON THE BLOOD OF THE MOTHER. The former are called AGNATI, the latter COGNATI. I shall therefore set down a scheme of pedigrees, as high as great-grandfather and great-grandmothers grand-sires, and as low as great grand-child; which nevertheless will be APPLICABLE TO MORE REMOTE SUCCESSIONS with a little variation; and will explain the whole nature of descents, or hereditary successions.

THIS pedigree, with its application, will give a plain account of all hereditary successions, under their several cases and limitations, as will appear by the following rules; taking our mark, or epocha, from the FATHER and MOTHER.

But first, I shall premise certain GENERAL RULES, which will direct us much in the course of descents, as they stand here in England, viz.

FIRST, in descents, the LAW PREFERS THE WORTHIEST OF BLOOD. (a) As,

1st, IN all descents IMMEDIATE the male is preferred before

(a) Or, in other words, sons are admitted before daughters.—As, if Caius hath two sons, *A.* and *B.* and two daughters, *C.* and *D.* and dies;—first *A.* and (in case of his death without issue) then *B.* shall be admitted to the succession, in preference to both the daughters. Blac. Com, 2 v. 213.

perpetually loading descents with services, and of consequence were led to direct those descents, where those services were likely to be maintained with the greatest vigour and advantage: this is the fairest reason, and looks likely to be the true one, why the father cannot succeed (in this kingdom) into the landed estate of his son; because he cannot be supposed in a condition to perform the service that is expected from it*. “In prohibiting the lineal ascent, the common law,” says Sir Edward Coke, “is assisted with the law of the Twelve Tables.”† See Table 5, l. *de successione ab intestato*. But neither in this, nor in any other part of the Twelve Tables, do I see (adds Mr. Hargrave, in his comment on Coke) any thing to exclude lineal ascent; and as I have not met with any book on the Roman law, in which such exclusion is mentioned, I conclude, that Coke is mistaken in his idea of our laws conforming to the law of the Twelve Tables. The mother was indeed excluded; but it was not because the law of the Twelve Tables did not permit lineal ascent, but on account of her sex, that law preferring the *agnati*, or those related through males, and excluding the *cognati*, or those related through females. See 3 Inst. 3. Princ. and Harg. note 2. on Co. Lit. 11. a.

* Tay. Elem. Civ. Law, 544.

† 1 Inst. 11. b.

THE FEMALE LINE.		THE MALE LINE.	
Triterus, or Great Grandfather's Great-Grandfather.		Tritavia, or Great Grandmother's Great Grandmother.	
Atavus, or Great-Grandfather's Grandfather.		Atavia, or Great Grandmother's Grandmother.	
Abavus, or Great-Grandfather's Father.		Abavia, or Great Grandmother's Mother.	
Proavita Magna, Propatrus Magnus, Gr. Great-Aunt. Gr. Great-Uncle.		Proavia, or Proavunculus, Gr. Grandmother. Gr. Great-Uncle.	
Amita Magna, Gr. Great-Aunt.		Avia, or Avunculus Mag. Gr. Grandmother. Great-Uncle.	
Amita, or Aunt.		Matertera Magna, Gr. Great-Aunt.	
Soror, his Sister.		Matertera, Mother's Sister.	
Nepos, Neptis, Nephew. Niece.		Consobrinus, a Mother's Sister.	
		Consobrina, a Mother's Sister's Daughter.	
		Consobrinus, a Mother's Brother's Son.	
		Consobrina, a Mother's Brother's Daughter.	
		Filius Primus, eldest Son.	
		Nepos, Neptis, Nephew. Niece.	
		Nepos, or Neptis, Grand-son. Grand-daughter.	

Note. The descendants from all these six in the next degree, if Male, is called *Pro-nepos*, if Female, *Proneptis*, i. e. *Great Grandson*, or *Great Grand-daughter*.

younger brother ; because though the female be LESS worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger (z). And upon this account it is,

Thirdly, That if a man have TWO daughters, and the eldest dies in the life of the father, leaving six daughters, and then the father dies ; THE YOUNGEST DAUGHTER SHALL HAVE AN EQUAL SHARE WITH THE OTHER SIX DAUGHTERS ; because they stand in representation and stead of their mother, who could have have had but a MOIETY.

Fourthly, that by the law of England, without a special custom to the contrary, THE ELDEST son, or brother, or uncle, EXCLUDES THE YOUNGER. And the males in an equal degree do not all inherit. But ALL THE DAUGHTERS, whether by the same or divers venters, do INHERIT TOGETHER TO THE FATHER.—And all the sisters, BY THE SAME VENTER, do inherit to the brother (a).

Fifthly, that THE LAST ACTUAL SEISIN IN ANY ANCESTOR, MAKES HIM, AS IT WERE, THE ROOT OF THE DESCENT, equally to many intents, as if he had been a purchaser : and therefore he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall NOT inherit (b). And hence it is, that where lands descend to the eldest son from the father, and the son enters and dies without issue ; his sister of the whole blood shall inherit AS HEIR to the brother, and not the younger son of the HALF BLOOD ; because he cannot be

(z) And these representatives take neither more nor less, but just so much as their principals would have done.—This taking by representation is called succession *in stirpes*, according to the roots ; since all the branches inherit the same share that their root, whom they represent, would have done. Blac. Com. 2 v. 217. The Jewish succession was after the same manner.—Seld. de Succ. Ebr. c. 1.—Though the Roman somewhat differed.—Nov. 110. c. 3. Inst. 3. 1. 6. But see particularly Blac. Com. 2 v. 218.

(a) As if Caius hath two sons A. and B. and two daughters C. and D. and dies ;—A. his eldest son shall alone succeed to his estate, in exclusion of

B. the second son and both the daughters : but, if both the sons die without issue before the father, the daughters C. and D. shall both inherit the estate, as coparceners, Lit. Sec. 5. As to this right of primogeniture in males, see Blac. Com. 2 v. 214.

(b) “ A man (saith sir Edward Coke) that claimeth as heir in fee-simple, to some man by descent, must make himself heir to him that was last seised of the actual freehold and inheritance.” 1 Inst. 11. b. See also 8 Co. 36. a. where 11 Hen. IV. 11. and 40 E. III. 9. are cited to prove this doctrine. And 1 Inst. 14. b. 15. b. W. Jo. 361. Blac. Law Tr. oct. v. 1. 180. and Blac. Com. 2 v. 208 to 212. 227, 228.

heir in the brother of the half blood (c). But if the eldest son had survived the father, and died BEFORE ENTRY, the youngest son should inherit, AS HEIR TO THE FATHER, and not the sister; because he is heir to the father, who was LAST ACTUALLY SEISED. And hence it is, that though the uncle is preferred before the father, in descents to the son; yet if the uncle enter after the death of the son, and die without issue, the father shall inherit to the uncle, QUIA SEISINA FACIT STIPITEM.

Sixthly, that WHOSOEVER DERIVES A TITLE to any land, MUST BE OF THE BLOOD TO HIM THAT FIRST PURCHASED IT (d). And this is the reason why, if the son PURCHASE lands and dies without issue, it shall descend to the heirs of the part of THE FATHER; and if he has none, then to the heirs on the part of the mother: because though the son has both the blood of the father and of the mother in him, yet he is of the whole blood of the mother, and the consanguinity of the mother are CONSANGUINEI COGNATI of the son (e).

And of the other side, if the father had purchased lands, and it had DESCENDED to the son, and the son had died without issue, and without any heir of the part OF THE FATHER,—it should NEVER have descended in the line of the MOTHER, but escheated. For though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity TO THE FATHER, who was THE PURCHASER. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the GRANDMOTHER; because her *consanguinei* were as well of the blood of the father, as the mother's consanguinity is of the blood of the son. Consequently also, if the GRANDFATHER had purchased lands, and THEY HAD DESCENDED to the father, and from him to the son; if the son had entered and died without issue, HIS father's brothers, or sisters, or their de-

(c) See note (x).

(d) The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether by sale, gift, or any other mode, except only that of descent.

(e) Lit. Sec. 4. *passim*, and Co. Lit. 12. a. with Hargrave's notes.—For an explication of the principle which governs this rule of descents, see Blac. Com. 2 v. 220 to 223. Sir Edw. Coke, in 1 Inst. 13. a. says, "When lands

DESCEND from the part of the father, the heirs of the part of the mother shall never inherit."—But if the eldest son PURCHASES land, and it descends to the youngest son, and he dies without heir of the part of the father, it shall descend to the heir on the part of the mother, because they have one and the same mother." Harg. n. 5. on Co. Lit. 13. a. He cites Hal. MSS.—But see post, the sixth rule of transversal ascending descents.

scendants ; or, for want of them, HIS great-grandfather's brothers, or sisters, or their descendants ; or, for want of them, ANY OF THE CONSANGUINITY OF THE GREAT-GRANDFATHER, or brothers or sisters of the great-grandmother, or their descendants, might have inherited. For THE CONSANGUINITY OF THE GREAT-GRANDMOTHER WAS THE CONSANGUINITY OF THE GRANDFATHER. But none of the line of the mother, or grandmother, viz. the grandfather's wife, should have inherited, for that they were NOT of the blood of the first purchaser. And the same rule, *et converso*, holds in purchases of the line of the mother, or grandmother. They shall always keep in the SAME line that the first purchaser settled them in.

But it is not necessary, that he that inherits be always heir to THE PURCHASER. It is sufficient if he be of HIS BLOOD, and HEIR to HIM that was LAST SEISED. The father purchases lands which descended to the son, who dies without issue, they shall never descend to the heir of the part of the son's MOTHER. But if the son's GRANDMOTHER has a brother, and the son's GREAT-GRANDMOTHER hath a brother, and there are NO OTHER kindred, they shall descend to the GRAND-MOTHER'S BROTHER. And yet, if the father had died without issue, HIS GRANDMOTHER'S BROTHER should have been preferred before his mother's brother ; because the former was heir OF THE PART OF HIS FATHER, though a female, and the latter was only heir of the part of his mother. But where the son is once SEISED, and dies without issue, HIS GRANDMOTHER'S BROTHER IS TO HIM HEIR OF THE PART OF HIS FATHER ; and being nearer than his great-grandmother's brother, is preferred in the descent.

But note, this is always intended so long as the line of descent is not broken. For if the son ALIEN those lands, and then REPURCHASE them again in FEE ; then the rules of descents are to be observed, as if he were the original PURCHASER ; and as if it had been in the line of the father or mother.

Seventhly, in all successions, as well in the line descending, transversal, or ascending, THE LINE THAT IS FIRST DERIVED FROM A MALE ROOT, HAS ALWAYS THE PREFERENCE.

Instances whereof in the line DESCENDING, &c. viz.

A. has issue two sons, B. and C.—B. has issue a son and a daughter, D. and E.—D. the son, has issue a daughter F.—and E. the daughter, has issue a son G.—Neither C. nor any of his

descendants, shall inherit, so long as there are ANY descendants from *D.* and *E.*— and neither *E.* the daughter, nor any of HER descendants, shall inherit, so long as there are ANY descendants from *D.* the son, whether they be male or female.

So in descents COLLATERAL, as brothers and sisters; the same instances applied thereto, evidence the same conclusions.

But in successions in the line ASCENDING, there must be a fuller explication; because it is darker and more obscure. I shall therefore set forth the whole method of TRANSVERSAL ASCENDING DESCENTS, under the eight ensuing rules, viz.—

First, if the son purchases lands in fee-simple, and dies without issue, those of the male line ascending, USQUE INFINITUM, shall be preferred in the descent, ACCORDING TO THEIR PROXIMITY OF DEGREE TO THE SON; and therefore, the father's brothers and sisters, and their descendants, shall be preferred before the brothers of the grandfather and their descendants. And if the father had no brothers nor sisters, the grandfather's brothers and their descendants, and for want of brothers, HIS sisters and their descendants, shall be preferred before the brothers of the great-grandfather. For although by the law of England the father or grandfather cannot IMMEDIATELY inherit to the son, yet the direction of the descent, to the COLLATERAL ASCENDING LINE, is as much, as if the father or grandfather had been by law inheritable: and therefore, as in case the father had been inheritable, and should have inherited to the son before the grandfather, and the grandfather, before the great-grandfather, and consequently if the father had inherited and died without issue, his eldest brother and his descendants should have inherited before the younger brother and his descendants; and if he had no brothers, but sisters, the sisters and their descendants should have inherited before his uncles, or the grandfather's brothers and their descendants.—So though the law of England EXCLUDES the father from inheriting, yet it substitutes and directs the descent as it should have been, had the father inherited; viz. IT LETS IN THOSE FIRST THAT ARE IN THE NEXT DEGREE TO HIM (*f*).

Secondly, the second rule is this: that the line of the part of the MOTHER shall never inherit, AS LONG AS THERE ARE ANY, THOUGH NEVER SO REMOTE, OF THE LINE OF THE PART OF THE FATHER. And therefore, though the mother

(*f*) Year-book M. 12th Edw. IV. *ibid.* 38. Blac. Com. 2 v. 223.
14. Fitz. Abr. tit. Discent 2. Brook,

has a brother, yet if the *atavus* or *atavia patris*—i. e. the great-great-great-grandfather, or great-great-great-grandmother of the father—has a brother or a sister, he or she shall be preferred, and exclude the mother's brother, though he is much nearer.

Thirdly, but yet further, the MALE line of the part of the father ASCENDING, shall, IN ÆTERNUM, exclude the female line of the part of the father ascending; and therefore in the case proposed, of the son's PURCHASING lands and dying without issue, the sister of the father's grandfather, or of his great-grandfather, and so, IN INFINITUM, shall be preferred before the FATHER'S MOTHER'S BROTHER; tho' the father's mother's brother be a male, and the father's grandfather or great-grandfather's sister be a female, and more remote; because SHE IS OF THE MALE LINE, which is more worthy than the female line, though the female line be also of the blood of the father.

Fourthly, but as in the male line ascending, THE MORE NEAR is preferred before the more remote; so in the female line DESCENDING (g),—so it be OF THE BLOOD OF THE FATHER,—it is preferred before the more remote. The son therefore PURCHASING lands, and dying without issue; and the father, grandfather, and great-grandfather, and so upward, ALL THE MALE LINE BEING DEAD, without any brother or sister, or ANY DESCENDING from them;—but the father's mother has a sister or brother; and also the father's grandmother has a brother, and likewise the father's great-grandmother has a brother:—though it is true, that ALL THESE ARE OF THE BLOOD OF THE FATHER; and though the very remotest of them shall EXCLUDE the son's mother's BROTHER; and though it be also true, that the great-grandmother's blood has passed through more males of the father's blood, than the blood of the grandmother, or mother of the father; yet, in this case, THE FATHER'S MOTHER'S SISTER SHALL BE PREFERRED before the father's grandmother's brother,—or the great-grandmother's brother:—because THEY are all in the FEMALE line, viz. *cognati* and not *agnati*; and the father's mother's sister is the NEAREST, and therefore shall have the preference; as well as in the male line ASCENDING, the FATHER'S brother, or HIS sister, shall be preferred before the grandfather's brother.

(g) Qu. if it should not be "in the female line" ASCENDING—See Brook. And note Hale, in the conclusion of this fourth rule of "transversal ASCENDING descents."—See Plowd. 450. in the case of Clere and

Fifthly, but yet in the last case, where the son purchases lands and dies without issue, and without any heir on the part of the grandfather, the lands shall descend to the grandmother's brother or sister, as heir on the part of his father; yet if the FATHER had PURCHASED this land and died, and it DESCENDED to his son, who died without issue; the lands should NOT have descended to the father's mother's brother or sister, for the reasons before given in the third rule: but for want of brothers or sisters of the grandfather, great-grandfather, and so upwards, in the male ASCENDING line, it should descend to the father's grandmother's brother, or sister, WHICH IS HIS HEIR OF THE PART OF HIS FATHER;—who should be preferred before the father's mother's brother; who is, in truth, the heir OF THE PART OF THE MOTHER of the purchaser, though the next heir of the part of the father of him that LAST DIED SEISED. And therefore, as if the father that was the purchaser had died without issue, the heirs of the part of the father, whether of the male or female line, should have been preferred before the heirs of the part of the mother; so the son, WHO STANDS NOW IN THE PLACE OF THE FATHER, and inherits to him primarily, in his father's line, dying without issue, the same devolution and hereditary succession should have been, as if his father had immediately died WITHOUT ISSUE;—which should have been to his grandmother's brother, as heir OF THE PART OF THE FATHER, though by the female line; and not to his mother's brother, who was only heir of the part of his MOTHER, and who is not to take, till the father's line, both male and female, be spent.

Sixthly, if the son PURCHASES lands and dies without issue, and IT DESCENDS to any heir of the part of the father; THEN if the line of the father, AFTER ENTRY AND POSSESSION, fail, it shall NEVER return to the line of the mother (h); though in the FIRST instance, or first descent from the son, IT MIGHT have descended to the heir of the part of the mother: for by this descent and seisin, IT IS LODGED IN THE FATHER'S LINE, to whom the heir of the part of the mother can NEVER derive a title, as heir, but it shall rather escheat. But if the heir of the part of the father had NOT ENTERED, and THEN THAT line had failed, it might have descended to the heir of the part of the mother, AS HEIR TO THE SON; to whom immediately, for want of heirs of the part of the father, it might have descended.

(h) But see note (e).

Seventhly, and upon the same reason, if it had **ONCE DESCENDED** to the heir of the part of the father of the grandfather's line, and **THAT** heir had **ENTERED**, it should never descend to the heir of the part of the father of the grand-MOTHER's line; because the line of the gandmother was **NOT** of the blood, or consanguinity of the line of the grand-MOTHER's side (*i*).

Eighthly, if for default of heirs of the purchaser, of the part of the father, the lands **DESCEND** to the line of the mother;—the heirs of the mother, of the part of **HER FATHER'S SIDE**, shall be preferred in the succession, before her heirs of the part of her **MOTHER'S** side;—because they are **THE MORE WORTHY**.

And thus the law stands in point of descents, or hereditary successions, in England, at this day; and has so stood and continued for above four hundred years past; as, by what has before been said, may easily appear. And note, the most part of the eight rules and differences above specified and explained, may be collected out of the resolutions in the case of *Clere v. Brook, &c.* in *Plowden's Commentaries*, folio 444 (*k*).

(*i*) All the editions have it "grand- "grandFATHER's side?" MOTHER's," but should it not be

(*k*) See Blackstone's state of this case, *Com. 2 v. 236*, who controverts the opinion which sir Matthew Hale adopted, in consequence of the doctrine laid down by justice Manwoode in that case. See also *Dy. 314. pl. 96. S. C. Vin. Abr. tit. Descent, F. 2. pl. 1. t. Heir. E. Dr. and Stud. lib. 1. c. 7. fo. 22.*

In the year 1779, an anonymous pamphlet* was published, intitled, "Remarks on the laws of Descent; and on the reasons assigned by Mr. Justice Blackstone, for rejecting in his table of Descent, a point of doctrine laid down in *Plowden*, *Lord Bacon*, and *Hale*." The author first states the disputed doctrine, as laid down by *Manwoode*, in the case of *Clere and Brook*, namely, that "the brother or sister of the purchaser's grandmother, viz. the mother of the purchaser's father, shall be preferred to the brother or sister of the purchaser's great grandmother, viz. the mother of the purchaser's father's father; because they are equally worthy in blood; for such heirs come from the blood of the female sex, from which the purchaser's father issued; and where they are equally worthy, the next of blood shall always be preferred as heir." The objections of *Blackstone* are then stated; after which the author proceeds to consider the first principles of inheritance.

* The author was Mr. Osgood, then at Justice of Canada. the bar; and afterwards appointed Chief

The first claim to inheritance, he states, arises from *DIGNITY of blood*; but, as it frequently happens that the claimants are equal in point of dignity, the right of inheritance arises, secondly, from *PROXIMITY of blood* to the person last seized. The first is absolute, and operates on all occasions; the second admits of some modification, whereby it differs from the strict idea of proximity.

Having established these principles, the author proceeds with his remarks on the reasons assigned by Blackstone, for preferring the heirs of the great-grandmother on the father's side, in opposition to Manwoode, who prefers the heirs of the grandmother on the same side.

As to the first reason of Blackstone,—“because this point was not the principle question in the case of Clere and Brook, but the law concerning it is delivered *obiter* only, and in the course of argument, by Manwoode, though afterwards said to be confirmed by the three other justices, in separate extra-judicial conferences with the reporter;”—admitting that the present point was not the principal question in the case, the author remarks, that as it was laid down by a judge in court, and delivered in his judicial capacity, some respect is due to his sentiments. That when illustrations are applied by analogy, parity of reasoning must run through the whole subject; and that if the decision itself be just, the arguments which lead to, or arise from that decision, must be just also: that though Blackstone may not allow that the law delivered *obiter*, was founded on the same substantial reasons, which led to the final judgment; still he could not contend, that because it was delivered *obiter*, it was therefore less reasonable; or because it was said to be confirmed by the three other justices, that it was not their opinion; or, if it was their opinion, that it was a bad one.

As to the second reason,—“because the chief justice, Sir James Dyer, in reporting the resolution of the Court, in what seems to be the same case, takes no notice of this doctrine,”—he remarks, that the report of Sir James Dyer is extremely short*, and does not give the distinct opinion at large, of any of the bench, even to the point before them; he, therefore, cannot be expected to take notice of any collateral matter. If we wish to see the arguments of the judges, Plowden hath reported them. If we are not satisfied, whither can we refer? Plowden is positive; Dyer is neutral; and surely, we ought not to discredit the representations of the former, and argue from the silence of the latter. From Plowden it appears that the chief justice was present, when Manwoode delivered this, as law. What then can we infer from his silence, except his consent?

As to the third reason,—“because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of Manwoode,” the author has given the note which Plowden subjoined to his report; which says that many were of opinion, that the brother of the great-grandmother should be preferred to the brother of the grandmother; but says likewise, that this position of Manwoode was confirmed by justice Harper, justice Mounson, and lord chief justice Dyer. Therefore, continues the author, when Bacon and Hale adopted this position, they had the unanimous opinion of the bench to support it; when the author of the Commentaries disallowed it, he was only justified by the scruples of many bye-standers to reject it.

* Dy. 314. pl. 95.

As to the fourth reason,—“because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; and destroys also that constant preference of the male stocks, in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood;” the author compares the position of Manwoode with the principles above stated, from whence he infers;

First, that in point of *dignity* of blood, the claimants are equal; they representing female stocks of the paternal line; therefore upon that ground merely, the one could not be preferred to the other; but

Secondly, that in point of proximity, the grandmother is nearer to the person last seized, than the great-grandmother; it follows then, continues the author, that this position, being supported by the principles of inheritance, cannot destroy that regular symmetry, which arises from a conformity to those very principles.

With respect to the latter part of the fourth reason, he professes himself at a loss to understand in what manner the position of Manwoode can “destroy the constant preference of the male stocks;” when, by the very terms of the question, they and their descendants are extinct.

As to the fifth reason,—“because it introduces all that uncertainty and contradiction pointed out by an ingenious author (*Law of Inheritances*, 2d edit. p. 30, 38, 61, 62, 66), and establishes a collateral doctrine, incompatible with the principal point resolved in the case of *Clere and Brook*, [*viz.* the preference of No. 11. to No. 14, (a)] and though that learned writer proposes to rescind the principal point then resolved, it is apprehended that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all,”—the author shews that the charges of uncertainty and contradiction, though groundless, were not brought against Manwoode’s position in particular, but against “the descendants of the collateral ancestors of the higher classes;” comprehending among others, the class for which Blackstone contends; and that the deliberate opinion of the ingenious author of the *Law of Inheritances*, where he simply informs us what the law is (not what it ought to be), supports the position of Manwoode, and is directly contrary to that of Blackstone.

With respect to the charge of “incompatibility,” mentioned in the same reason, the author remarks, that to establish the charge, it should be proved that one was more worthy than the other.—This hath not been attempted. Therefore, continues he, if the reputation of the Commentator did not prevent us from making hasty conclusions, we should be well justified in treating this charge as a violent assumption.

As to the sixth reason,—“because the reason that is given for this doctrine in Plowden, Bacon, and Hale, (*viz.* that in any degree paramount the first, the law respecteth proximity, and not dignity of blood) No. 18. ought also to be preferred to No. 16. which is directly contrary to the eighth rule laid down by Hale himself,”—the author admits that Lord Bacon expresses himself in these direct terms; “in any degree paramount the first, the law respecteth proximity and not dignity of blood;” but observes, that as it is totally repugnant to the spirit of those laws, from whence the doctrine of descent originates,

* The numbers 11 and 14 in Blackstone’s Table of Descents, Com. 2 v. 240.

so it has been contradicted by every writer on the subject, and is therefore inadmissible. As to any such doctrine in Plowden or in Hale, the author professes he could find none; but on the other hand, contends that they have advanced doctrines supporting that of Manwoode, and directly contrary] to what is suggested in the reason.

As to the seventh reason,—“because this position seems to contradict the allowed doctrine of Sir Edward Coke, who lays it down (under different names), that the blood of the Kempes, alias Sandies, shall not inherit, till the blood of the Stiles, alias Fairfields, fail: now the blood of the Stiles’s does certainly not fail, till both No. 9. and No. 10. are extinct: wherefore No. 11. being the blood of the Kempes, ought not to inherit till then,”—the author admits that the blood of John Stiles does not fail while No. 10. exists, but observes that George Stiles the grandfather married Cecelia Kempe, and that, according to Sir Edward Coke, “the father hath two immediate bloods in him, the blood of his father and the blood of his mother, and both these bloods are of the part of the father.” It is therefore evident, says he, that as the blood of John Stiles does not fail while No. 10. exists, so neither does it fail while any of the representatives of the grandmother, or No. 11. exist.—Such being the claim of No. 11. the author proceeds to discuss the right by the rule of Blackstone himself, that, “in order to ascertain the collateral heir of John Stiles, it is in the first place necessary to recur to his ancestors in the first degree; on default of which, we must ascend one step higher, to the ancestors in the second degree; then to those of the third and fourth, and so upwards, *ad infinitum*, till some ancestors be found who have other issue descending from them, beside the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent.” In obedience to this rule, continues he, let us recur to the first degree;—ancestors there are none living:—to the second; by the question, they are extinct:—in the third we find No. 11, or the representatives of the paternal grandmother. If, for the sake of speculation, we pursue our enquiries, we may find collateral ancestors in the fourth degree, or No. 10, but the inheritance is previously vested; it is cast on No. 11. Again, in the Commentaries we find this direction: “In order to keep the state of John Stiles as nearly as possible in the line of his purchasing ancestors, it must descend to the nearest couple of ancestors that have left descendants behind them.” Can it, adds the author, remain a doubt, which is the nearest couple, or whose issue shall succeed?

As to the eighth reason,—“because in the case M. 12. Ed. 4. 14. Fitz. Abr. t. Descent, 2. Bro. Abr. t. Descent, 38. (much relied on in that of Clere and Brook) it is laid down as a rule, that *Cestuy que droit inheriter al pere doit inheriter al fils*; and so Sir Matthew Hale says, that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been had the father inherited: now it is settled, in the resolution in Clere and Brook, that No. 10. should have inherited to Geoffrey Stiles the father before No. 11, and therefore No. 10. ought also to be preferred in inheriting to John Stiles the son;”—the author first states the authority from the Year-Book at large, which says, that when all the representatives of the male stock, of the paternal line, are extinct, “the heir of the son on the part of the Ailes (for whom Manwoode contends), ought to in-

"herit." Having expressed his surprize, that an argument should be drawn from a case which he might justly cite in his own support, he proceeds to state the authority referred to in Sir Matthew Hale, who, in his opinion, meant to exemplify the doctrine of proximity by its several degrees; and to inform us, that though the father, grandfather, and great-grandfather cannot immediately inherit, still we must resort to them, as to the stocks from whence we are to trace proximity and primogeniture. And to this rule, continues the author, hath he referred the matter at present in question, which he hath stated and decided in the following terms: "When the son is once seised, and dies without issue, his grandmother's brother (or No. 11.) is to him heir of the part of his father, and, being nearer than his great-grandmother's brother, is preferred in the descent."

Having thus shewn that no such doctrine as that contained in the eighth reason, can be gathered from the authorities there cited, the author goes on to shew, that if it be a point, it is nevertheless inconsistent with the laws of descent; because it contradicts the approved maxim, *seisina facit stipitem*; for if we are to trace from the father, it will introduce universal confusion; will confound the distinction made by Sir Edward Coke, "that the father hath two bloods in him, by which means the father's mother, though of the female line to him, is of the male line to the son;" for if we are to trace from the father, his mother must be of the female line to the son; and what is still more injurious, in such case, the whole maternal line will be totally excluded, for there is no privity of blood between the father and the line of the mother.

The author then contends, that the resolution in Clere and Brook is in directly stated in the eighth reason. It was there settled, says he, that the heir of the paternal grandmother, of the person last seised, should succeed in preference to the mother's brother: whereas in the Commentaries we are told who might, or who should have succeeded to the father.

Upon the whole, the author asserts, that, of the foregoing reasons, the first, second, and third, are merely speculative; the fourth is drawn from an inapplicable medium, and a charge which is contradicted by the express words of Plowden; the fifth depends upon a distorted authority, and violent assumption; the sixth on a misquotation; the seventh involves a contradiction between the table and the text; and of the eighth it would not be improper to say, that it collects a point of doctrine from authorities by which that doctrine is opposed, and which point is applied to a case we are directed not to allow; and from which an inference is drawn, though we are enjoined not to admit of the premises.

Such are the remarks upon the reasons assigned by Blackstone for opposing the doctrine of Manwoode; in the course of which decency is not violated by the petulance of controversy, nor truth offended through zeal for a favourite system. Mr. CHRISTIAN, editor of Blackstone's Commentaries, concurs with the learned Commentator in preferring No. 10. to No. 11.—For his reasons, see Blac. Com. 2 v. 239. ed. 1794.—Long subsequent to the publication of Mr. Osgood's pamphlet, a case occurred on the Midland Circuit, at Northampton Spring Assizes, in the year 1807, before the late Mr. Justice Roke.—The case was *Doe* on the demise of the Rev. Richard Walker.

But for the better illustrating and clearing of the rules and methods of descents, and of the different directions of the civil law, the canon law, and the common law therein, I shall here subjoin the so-much-famed *Arbor Civilis* of the civilians and canonists which being compared with the *Gradus Parentelæ* in the First Institutes, will fully illustrate what has been already said (7).

Clerk, v. Harpur, and, in which the point in question arose, and was discussed.—The learned Judge, adopted the opinion of Mr. Justice Blackstone, and nonsuited the plaintiff. In the following Term, a motion for a new trial, was made in C. P. by Mr. Serjeant Shepherd; and a rule to shew cause granted; but, without any cause being shewn against the rule, Mr. Justice Rooke admitted that though he had entertained that opinion at the trial, yet on more mature consideration, was satisfied his decision was wrong, and that the opinion of Sir Matthew Hale was right on the subject.

Here it may in general suffice to observe, that inheritable blood is wanting to such as are not related to the person last seised—to maternal relations, in paternal inheritances; and *vice versa*—to kindred of the half blood—to monsters—bastards—aliens, and their issue—to persons attainted of treason or felony, and to papists, in respect of themselves only by the statute law, 14 & 19 W. III. c. 4. but see 18 Geo. III. c. 6. and 31 Geo. III. c. 32.—Persons so circumstanced, are excluded from taking by descent; and in consequence, the estate in the language of the law, “*escheats*” or falls to the lord of the fee. See Blac. Com. l. 4. c. 15. *passim*.

(7) Brac. l. 2. cap. 31. Brit. cap. 89. Fleta, l. 5. cap. 7. Mir. cap. 1. sec. 3. Co. Lit. 18. b.—Bracton and Britton, mention that they had drawn out, in their books, a *tree* of parentage, by which it would plainly appear how the degrees of consanguinity are to be accounted, which is not printed in either of their books; therefore, says Plowdon (fo. 451. ed. 1781.)—I have drawn it out in the line direct descending and ascending, according to the notion of Bracton (as far as I was able to collect from his book,) which is agreeable with the civil law; and which Sir Matthew Hale seems to have adopted.

CHAP. XII.

Touching Trial by Jury.

HAVING in the former chapter somewhat largely treated of the course of descents, I shall now, with more brevity, consider that other title of our law which I before propounded—in order to evidence the excellency of the laws of England above those of other nations,—viz. the trial by a jury of twelve men; which, upon all accounts, as it is settled here in this kingdom, seems to be the best trial in the world. I shall therefore give a short account of the method and manner of that trial (A).

(A) The method of trial by *jury*, which is also denominated trial *per pais*, or *by the country*, is justly esteemed one of the chief excellencies of our Constitution, it being an institution most admirably calculated for the preservation of liberty, life, and property: indeed, what greater security can we have for these inestimable blessings, than the certainty that we cannot be divested of either, without the unanimous decision of twelve of our honest and impartial neighbours? Our sturdy ancestors insisting on it as the principal bulwark of their liberties, compelled the confirmation of it by *Magna Charta*; “Nullus liber homo capiatur, (speaks the Charter, chap. 29.) vel imprisonatur, aut disceisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagatur, aut exuletur, aut aliquo modo destruetur, nec super eum ibimus, nec super eum mittimus, NISI PER LEGALES JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ.”

The invention of this species of trial has been attributed to the superior genius of Alfred; there seems but little reason, however, to adopt the idea; the merit of Alfred consisting rather in fixing the number, and determining the qualities of jurors, than in the institution itself (a). The truth seems to be, that this tribunal was universally established among all the Northern nations, and so interwoven in their very constitutions, that the earliest account of the one gives us also some traces of the other. There seem to be some traces of it, in the institutions of Odin, the first great leader of the Asiatic Goths, or Getæ, into Europe. Upon his expedition, he ordained a council of twelve to decide all matters which might come in question. At first they

(a) Sulliv. Lect. xxvi.

First, the writ to return a jury issues to the sheriff of the county (a). And,

First, HE is to be a person of worth and value, that so he may be RESPONSIBLE for any defaults, either of himself, or his officers; and is sworn, faithfully and honestly to execute his office. This officer is entrusted to elect and return the jury, which he is obliged to do in this manner: first, without the nomination of either party; secondly, they are to be such persons, as for estate and quality are fit to serve upon that employment; thirdly, they are

(a) For the antiquity and office of sheriff, see Co. Lit. 168. Blac. Com. Laud. cap. 24. 1 v. 116.—but particularly *Id.* 338 to

were both jurors and judges. Their decisions were highly respected. But in process of time, the business increased;—matters of fact only were submitted to twelve men; and one or more of the learned were to give sentence, according to the ancient customs, records, and traditions. So, from the Gothic laws of Spain, it is manifest the institution was known and practised there. See *Hist. des Cortes d'Espagne*, par M. Sempere. The Spanish jury, however, was of dubious utility: and no efforts were made to produce the improvements of which it was susceptible. They cast away the unpolished gem, contemning its worth, and disdaining the labour of bringing out its lustre. Far different was the cheering progress of the laws of England.—Never wholly or suddenly departing from their pristine character, it has been the peculiar happiness and blessing of this country, that the institutions of the early ages have lost their rudeness, but retained their vigour. The erring tests of truth have been allowed to sink into oblivion; and the cumbersome array of compurgators, which often averted the righteous vengeance of the law, has been gradually matured into that great tribunal of our peers, which will ever remain the best safeguard of life and freedom. Among the Saxons, causes were adjudged by the aldermen and bishop of the shire, with the assistance of twelve men of the same county. Temp. hist. 155. In this nation, it has been used time out of mind, and is coeval with the first civil government thereof; and though its establishment was shaken for a time by the introduction of the Norman trial by battle, it was always so highly valued by the people, that no conquest, no change of government, could ever prevail to abolish it. See Fortesc. de Laud. Leg. Ang. cap. 25. Spelm. Gloss. verb. Jnrata. Glanv. l. 2. c. 7. Co. Lit. 155. Co. in Pref. to the 3d and 8th Rep. Blac. Com. 3 v. c. 23. passim. Sulliv. Lect. p. 247, 251, 294, 356. Barr. on Stat. 17, 18, 19, 86, 457. Hickey's Thes. vol. II. p. 34, Hall. View, c. 8. See also an essay on "The Constitution of England," written by J. L. de Lolme, cap. 9, 10, 11. This book is recommended to the public, by the author of the elegant letters under the signature of Junius, "as a performance, deep, solid, and ingenious." Pref. 31.

to be of the neighbourhood of the fact to be inquired, or at least of the county or bailiwick (*b*). And, fourthly, anciently four, and now two of them at least, are to be of the hundred (B).

Secondly, touching the number and qualifications of the jury.

(*b*) *Vicinus facta vicini præsumitur scire.* 1 Inst. 125.

(B) By the policy of our ancient law, the jury was to come *de vicineto*, from the neighbourhood of the place where the action was laid; and therefore, they were summoned from the very hundred in which the cause of action arose; and, in the opinion of Gilbert, the fact itself was originally determined in the court of the hundred. Living in the neighbourhood, they were most unquestionably of the very county, or *pais*, to which both parties had thought proper to appeal; and thus circumstanced, were supposed to have had a prior and a perfect knowledge, as well of the characters of the parties themselves, as of the witnesses, which each of them might think proper to adduce, in support of that, which he was called upon either to validate or defend: and from whence it was concluded, that they the better knew what credit to give to the facts in evidence before them. This convenience, however, was soon materially affected, from the difficulty of obtaining twelve freeholders in every hundred. To this difficulty may be added an inconvenience, which, in process of time, resulted from this ancient and long-continued mode of summoning the jury. It was found (Bar. Stat. 110.) that the jurors, from the very circumstance alone of being of the immediate neighbourhood, were too apt to be prejudiced. Long sensible of the difficulty of obtaining a perfect jury from the hundred, and daily perceiving the partiality of their decisions, our law has for a long time been gradually relinquishing the practice. In the reign of Edward the Third, the number of necessary hundreders was constantly six—these, in the time of Fortescue (*a*), were reduced to four. Indeed the statute 35 Hen. VIII. c. 26. restored the ancient number of six, but that was soon virtually repealed by statute 27 Eliz. c. 6. which required only two. However the number were reduced, yet some were continued; the law still conceiving it to be necessary that some at least of the *parcs* of the hundred, should determine the fact between the parties.—Sir Edward Coke indeed (*b*) adduces such a variety of instances, in which the Courts permitted the necessary number to be evaded, that it is manifest they were heartily tired of it.—At length, by statute 4 & 5 Ann. c. 16. it was entirely abolished in all civil actions, except on penal statutes; and upon those also by 24 Geo. 2. c. 18. the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood. See Baron Gilbert's Hist. and Pract. of the Court of Common Pleas, cap. 6, 7, 8. *passim*; a book which will reward the most studious attention.—It must be confessed, however, that this posthumous work, of so excellent an author, has suffered much from the ignorance and inattention of those who have attempted to edit it. See also Mr. Hargrave's note on Co. Lit. 124. a. and H. H. P. C. 2 v. 272.

(*a*) De Laud. c. 25.

(*b*) 1 Inst. 157.

As to their number, though only twelve are SWORN, yet twenty-four (c) are to be RETURNED, to supply the defects or want of appearance of those that are challenged off, or make default (d). Their qualifications are many, and are generally set down in the writ that summons them (e). They are to be PROBI ET LEGALES HOMINES. Of sufficient freeholds, according to several provisions of acts of parliament (C). Not convict of any notorious crime that may render them unfit for that employment. They are not to be of the kindred, or alliance, of any of the parties. And not to be such as are prepossessed or prejudiced before they hear their evidence.

Thirdly, the time of their return (f).

Indeed, IN ASSIZES, the jury is to be ready at the bar, the first day of the return of the writ; but in other cases, the

(c) At common law, even in civil cases, the sheriff might have returned "twelve."—For his reason, which is more than twenty-four, if he pleased. somewhat quaint, see Co. Lit. 155. a. He is restricted to twenty-four by the stat. West. 2. c. 38. The statute extends not to criminal prosecutions. 3 v. 352. Kelyng. 16.

(e) The writ of *venire facias*. Seld. on Fortesc. de Laud. c. 25. Blac. Com.

(f) The sheriffs should, by summons, notify to them their return, and likewise shew them the panel.

(C) By the statute Westminster 2. 13 Ed. I. c. 38. none shall pass on juries, in assizes, within the county, but such as may dispend twenty shillings by the year at the least; which is increased to forty shillings by the statute 21 Ed. I. statute 1 and 2 Hen. V. statute 2. c. 3. This was doubled by the statute 27 Eliz. c. 6. which requires in every such case the jurors to have estate of freehold to the yearly value of four pounds at the least. But the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 and 17 Car. II. c. 3. to twenty pounds *per annum*, which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However, by the statute 4 and 5 W. and M. c. 24: it was again raised to ten pounds *per annum* in England and six pounds in Wales, of freehold lands or *copyhold*; which is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts; though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Rich. III. c. 4. and 9 Hen. VII. c. 13. And, lastly, by statute 3 Geo. II. c. 25. any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of twenty pounds *per annum* over and above the rent reserved, is qualified to serve upon juries. When the jury is *de medietate linguæ*, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be cause of challenge to the alien, for, as he is incapable to hold any, this would totally defeat the privilege.

panel (g) is first returned upon the *venire facias*, or OUGHT TO BE SO, and the proofs, or witnesses, are to be brought, or summoned by *DISTRINGAS*, or *HABEAS CORPORA*, for their appearance AT THE TRIAL; whereby the parties may have notice of the jurors, and of their sufficiency and indifferency, that so they may make their challenges upon the appearance of the jurors, if there be just cause.

Fourthly; the place of their appearance.

If it be in cases of such WEIGHT AND CONSEQUENCE, as by the judgment OF THE COURT is fit to be tried AT THE BAR, then their appearance is directed to be THERE. But in ordinary cases, the place of appearance is in the country at the assizes, or *nisi prius*, in the county where the issue to be tried arises (h). And certainly this is an excellent constitution. The great charge of suits is the attendance of the parties, the jury-men and witnesses; and therefore though the preparation of the causes, in point of pleading to issue, and the judgment, is for the most part in the courts at Westminster, whereby there is kept a great order and uniformity of proceedings in the whole kingdom, to prevent multiplicity of laws and forms; yet those are but of SMALL charge, or trouble, or attendance; one attorney being able to dispatch forty men's business with the same ease, and no greater attendance than one man would dispatch his own business. The great charge and attendance is AT THE TRIAL, which is therefore BROUGHT HOME to the parties in the countries, and for the most part near where they live.

Fifthly, the persons BEFORE WHOM they are to appear,

If the trial be AT THE BAR, it is to be before that court where the trial is. If in the country, then before the justices of assizes, or *nisi prius*; who are persons well acquainted with the common law, and, for the most part, are TWO of those twelve ordinary justices who are appointed for the common dispensation of justice in the three great courts at Westminster. And this certainly was a most wise constitution: for

First, it prevents factions and parties in the carriage of business, which would soon appear in every cause of moment, were

(g) The panel is a narrow piece of parchment, on which the names of the jurors are written, and which is also annexed to the *venire*. A jury is said to be impanelled, when the sheriff hath entered their names in the panel.
(h) This is well explained by Mr. Justice Blackstone, in the third volume of his Commentaries, page 352. seq.

the trial only before men residing in the counties,—as justices of the peace, or the like ;—or before men of little or no place, countenance, or pre-eminence above others. And the more to prevent partiality in this kind, those judges are by law prohibited to hold their sessions in counties where they were born or dwell (i).

Secondly, as it prevents factions and part-taking, so it keeps both the rule and the administration of the laws of the kingdom UNIFORM. For those men are employed as justices, who, as they have had a common education in the study of the law, so they daily, in Term-time, converse and consult with one another; acquaint one another with their judgments; sit near one another in Westminster-hall, whereby their judgments and decisions are necessarily communicated to one another, either immediately, or by relations of others. By this means their judgments, and their administrations of common justice, carry a CONSONANCY, CONGRUITY, AND UNIFORMITY, ONE TO ANOTHER: whereby both the laws and the administrations thereof are preserved from that confusion and disparity that would unavoidably ensue, if the administration was by several INCOMMUNICATING hands, or by PROVINCIAL establishments. And besides all this, all those judges are solemnly sworn to observe and judge ACCORDING TO THE LAWS of the kingdom, and according to the best of their knowledge and understanding.

Sixthly, when the jurors appear, and are called, each party has liberty to take his challenge to the array itself, if unduly or partially made by the sheriff; or if the sheriff be of kin to either party:—or to the POLLS; either for insufficiency of freehold, or kindred or alliance to the other party;—or such other challenges, either principal, or to the favour, as render the juror unfit and INCOMPETENT to try the cause.—And the challenge being con-

(i) As it was reasonably apprehended, that the integrity of the judge might be biassed, if his interest was concerned, or his affections were engaged, it was wisely provided by the statutes 4 Ed. III. c. 2. 8 Rich. II. c. 2. and 33 Hen. VIII. cap. 24. that no judge of assize should hold pleas in any county wherein he was born or inhabited.* In the Roman empire the strictest regulations were established, to exclude any person, without the special dispensation of the emperor, from the government of the province where he was born. Cod. Justinian. l. i. tit. xli. Dion. l. lxxi. The same regulation is observed in China, with equal strictness and with equal effect.

* Rep. 49 G. 3.

fessed, or found true, by some of THE REST of the jury, that particular incompetent person is withdrawn (*k*).

Seventhly, then twelve, and NO LESS, of such as are INDIFFERENT and are returned upon the principal panel, or the *tales*, are sworn to try the same ACCORDING TO THE EVIDENCE.

Eighthly, being thus sworn, the evidence on either part, is given in, upon the OATH of witnesses (*l*), or other evidence by law allowed;—as records and ancient deeds (*D*); but later deeds and

(*k*) Challenges are of two sorts; either to the *array*, which is at once an exception to the whole panel, in which the jury are arrayed, or set in order by the sheriff, in his return; or, to the *polls*, *in capita*, and which are exceptions to particular jurors: these Sir Edward Coke (1 Inst. 156.) reduces to four heads; *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*. See Gilb. Hist. C. P. cap. 8. Seld. Baron. 11. 11. Finch. L. 401. But see Blac. Com. 1. 3. c. 23.

(*l*) Some trials by our law are determined by witnesses, without a jury; as of the life and death of the husband in dower, and in *Cui in villa*. Bract. 1. 4. tr. 6. cap. 7. 2 Ed. 2. tit. Tryal, 46. 8 Ed. 2. eod. tit. 95. 9 Ed. 2. tit. Judgment, 231. Dy. 165. a. 301. a.—But such cases relate only to issues which have no *venue* from whence a jury may be summoned. Seld. on Fortesc. de Laud. cap. 21. See Blac. Com. 3 v. cap. 22. and the case of Ilderton and Ilderton, reported by H. Blac. 2. v. 245.

(*D*) From the time of the Norman conquest, writings which we now call DEEDS, were generally called CHARTERS (*a*). The witnesses to charters were anciently, for the most part, men well known and of good condition, and very often persons of the neighbourhood. If the charters were executed in the county, they were frequently attested by gentlemen and clergy of the county: when they were executed in cities or in towns, they were often attested by the provost, mayors, bayliffs, or civil officers. “*Ad probationem investiture non alii teste; quam pares admittuntur, quia coram eis solemniter fieri debet investitura* (*b*).” Men of such distinction were probably known either by their hands, or by the signets which they affixed to their testimony; an attestation *in perpetuum rei memoriam* (*c*). If the charters came in question, and the parties were alive to prove them, they were admitted in proof; but if they were of ancient date and free from suspicion, upon producing them, they were allowed. It is generally thought, that Edward the Confessor first introduced the mode of affixing to charters a seal of wax. What Sir Edward Coke (*d*) says should be a little considered. It is true, the word (*sigillum*) occurs in many Latin charters before the Conquest; but if it be likewise true, that *sigillum* was in those times used in the same sense with *signum*, as Sir Henry Spelman (*e*) and others have observed, then perhaps no great stress can be

(*a*) Madox's Form Diss. III. Ingulph. p. 901. Pref. Epist. to Madox's Hist. Excheq. VIII. XVI.
 (*b*) Cujac. Com. in lib. i. de feud. tit. 1. p. 18. (edit Ludg. 1566). Madox's Form. Diss. XXVI.
 (*c*) Spelm. Reliq. 256.
 (*d*) 1 Inst. 7. a.
 (*e*) Ad v. v. Sigillum et Signum.

opies of records must be attested by the oaths of witnesses ;— and other evidence in the open court, and in the presence of the parties, their attornies, counsel, and all by-standers, and before

aid upon the words of subsignation to Edwy's charter, mentioned by Sir Edward Coke (*f*). *Sigillum* did not always signify a seal of wax. There is a charter of K. Edwy (A. D. 956) granting to the monastery of Bath 30 *Manscs*, &c. at Dyddanhamie, subsigned "Ego *Ædwig* rex Anglorum indeclinabitur concessi. †. Ego *Badgar* ejusdem regis frater celeritur concessi. †. Ego *Odo* Archiepiscopus cum signo sanctæ crucis impressi †. Ego *Ælffinus* Præsul sigillum agyæ crucis impressi † &c." As to Offa's charter, if Coke had informed us where it might be seen, it would, perhaps, appear to be either a great rarity, or a great counterfeit (*g*). In truth it may be taken for granted, that from the time of the Norman Conquest, seals were generally used in this kingdom. Then charters were ratified, or authenticated by affixing to them a seal of wax: and which custom has been used in England ever since (*h*). In Scotland, the seals of the inferior nobility, and better sort of freeholders, were in common use as early as the time of David the First, A. D. 1124. and were then esteemed as undeniable evidence, in courts of judicature: so that if a man's seal was proved, he was obliged to warrant the instrument to which it was affixed, and to submit to whatever inconvenience his own negligence might bring upon him (*i*). The ancient seals were in wax of different colours; red, green, or yellow; they were commonly either round or oval, though of different sizes. Those of ecclesiastical persons were usually oblong, or oval, though not always so. The seal was usually affixed to a label of parchment, fastened to the fold, at the bottom of the charter; or else to a silken string (*k*), fastened in like manner to the fold; or else to a piece of parchment, cut from the bottom of the charter, and made pendulous. The seal was apparently of great force, insomuch that the charter, in a manner, derived its whole strength and validity from it (*l*). In ancient times the credit of legal instruments was justified by the authentic seals of the parties, and not by the subscription of notaries (*m*). *Chirographum* was a deed consisting generally of two parts; one for each party, and both of the same tenor: for which purpose the deed was written twice, upon the same piece of parchment, and between the body of each part, the word *Chirographum* was written in capitals; the parchment was then dissected through the middle of those letters, and that either rectilinearly or indentwise (*n*). Charters were formerly executed with so much notoriety, that there was no necessity for the witnesses to subscribe their names; that being done by some clerk, in the presence of them all. Madox Form. Diss. xxxi. See more upon this article in Spelman's Remains of Ancient Deeds and Charters, and in Dr. Hickes's Epistolary Dissertation, passim. Camd. Brit. 345.

(*f*) Ubi supra.

(*g*) Madox's Form Diss. xxvii.

(*h*) Ibid.

(*i*) Nicholson, sc. H. L. 247, 8. Reg. Majest. L. c. 8.

(*k*) Hickes, 160.

(*l*) Madox Form. Diss. xxviii. Seld. iii. 1466, 7.

(*m*) Madox. ubi sup. p. 131.

(*n*) Ib. xxviii. ix.

the judge and jury: where each party has liberty of EXCEPTING, either to the competency of the evidence, or the competency or credit of the witnesses; which exceptions are PUBLICLY stated, and by the judges openly and publicly allowed or disallowed;—wherein if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers.—And if in his direction or decision he mistake the law, either through PARTIALITY, IGNORANCE, OR INADVERTENCY, either party may require him to seal A BILL OF EXCEPTION (m), thereby to deduce the error of the judge, if any were, to a due ratification or reversal by writ of error (E).

(m) This the judge is obliged to seal by stat. Westm. 2. 13 Ed. 1. c. 31.; should he refuse to seal it, the party may have a compulsory writ against him. Reg. Br. 182. a. 2 Inst. 487. This writ enjoins him to seal the bill of exceptions, if the fact alleged be truly stated; for, in the bill, the counsel must state the point wherein the judge is supposed to have erred. If to this writ the judge returns that the fact is untruly stated, when, in truth, the case is otherwise, then an action may be maintained against him for such his false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for trial, but in the next immediate supe-

rior court, upon a writ of error, after judgment given in the court below. But this mode has been of late years much discontinued, as it is now common for the courts to grant new trials for the misdirection of the judge at nisi prius. See the case of *Money v. Leach*, in 3 Bur. 1692, where the tenor of the writ, for the judge to acknowledge his seal to a bill of exceptions, and the whole form and ceremony of the transaction, is minutely reported.—For an assignment of errors, setting forth the bill of exceptions, see *Id.* 1746. Were bills of exception more frequent, the administration of justice might possibly become more stable.

(E) If the student be desirous of obtaining a thorough knowledge of the theory of evidence, he may, after perusing the twenty-third chapter of the 3d Book of Blackstone's Commentaries, consult *Duncombe's Trials per Pais*, in the chapter on Evidence,—the *Law of Evidence* by Chief Baron Gilbert; the title *Evidence*, in the several treatises on the pleas of the crown, and in the several abridgments of law and equity; and the head of Evidence, in the *Law of Nisi Prius*.^{*} The writings of the Civilians on Evidence are numerous; and the curious reader may see an account of them in Buderus's edition of the *Bibliotheca Juris selecta* by Struvius. Amongst the most admired of their professed writers on the subject are, Menochius *de Præsumptionibus*, Mascardus *de Probationibus*, Everhardus *de Testibus et Fide Instrumentorum*, and Farinacius *de Testibus*. Struvius's *Bibliotheca Juris* will be found very useful to the diligent student, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of most of the countries of Europe, and of the characters of the several writers. It is to be wished, that we had a *Bibliotheca Juris Anglicani*, written on the same critical

^{*} The most useful treatise on the subject, is that published by Mr. Phillips.

Ninthly, the excellency of this OPEN course of evidence to the jury, in presence of the judge, jury, parties and counsel, and even of the adverse witnesses, appears in these particulars.

1st, That it is openly, and not in private before a commissioner or two, and a couple of clerks; where, oftentimes witnesses will deliver that, which they will be ashamed to testify publicly.

2dly, That it is *ORE TENUS*, personally, and not in writing; wherein oftentimes, yea too often, a crafty clerk, commissioner, or examiner, will make a witness speak what he truly never meant, by dressing of it up in his own terms, phrases, and expressions. Whereas on the other hand, many times the very MANNER of delivering testimony, will give a probable indication, whether the witness speaks truly or falsely. And by this means also, he has an opportunity to correct, amend, or explain his testimony, upon further questioning with him; which he can never have, after a deposition is set down in writing (*n*).

3dly, That by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge, or any of the jury, or parties (*o*), or their counsel or attornies, to propound occasional questions; which beats and boulds out the truth much better, than when the witness only delivers a formal series of his knowledge, without being interrogated. And on the other side, preparatory, limited, and formal interrogatories in writing, preclude this way of occasional interrogations; and the best method of searching and sifting out the truth, is choaked and suppressed.

4thly, Also by this personal appearance and testimony of

and enlarged plan. Such a work has been attempted by Mr. Gatzert, a German writer, who published at Gottingen a book entitled, *Commentatio Juris exotici Historico-literaria de Jure communi Angliæ*. But though Mr. Gatzert, when the disadvantage of his being a foreigner is considered, has really done wonders, yet it is not to be conceived, that such a work can ever be executed with the requisite judgment, accuracy, and nicety, until the task is undertaken by one of our own country, who hath been regularly trained in the study of the English law, and familiarly acquainted with all the writers on our laws, constitution and history. Harg. note 1. on Co. Lit. 7. a.

(*n*) Blac. Com. 3 v. 373.

(*o*) Formerly those who knew how, and would venture to do it, were accustomed to plead their own causes. Of late times the practice has uniformly been otherwise; though the parties

may now, if they please, exercise that natural and indisputable right. Want of judgment, or of temper (independent of other reasons) in the parties interested, was a sufficient ground for the discontinuance.

witnesses, there is opportunity of **CONFRONTING** the adverse witnesses ; of observing the contradiction of witnesses sometimes of the same side ; and by this means great opportunities are gained, for the true and clear discovery of the truth.

5thly, And further, the very quality, carriage, age, condition, education, and place of commorance of witnesses, is, by this means, plainly and evidently set forth to the court and the jury ; whereby the judge and jurors may have a full information of them ; and the jurors, as they see cause, may give the more or less credit to their testimony.—For the jurors are not only judges of **THE FACT** ; but many times of the truth of evidence. And if there be just cause to disbelieve what a witness swears, they are **NOT** bound to give their verdict according to the evidence, or testimony of **THAT** witness. And they may sometimes give credit to **ONE** witness, though opposed by more than one. And indeed, it is one of the excellencies of this trial, above the trial by witnesses, that although the jury ought to give a great regard to witnesses and their testimony, yet **THEY ARE NOT ALWAYS BOUND BY IT** ; but may either upon reasonable circumstances, inducing a blemish upon their credibility, though otherwise in themselves in strictness of law they are to be heard, pronounce a verdict **CONTRARY** to such testimonies ; the truth whereof they have **JUST** cause to suspect, and may and **DO OFTEN**, pronounce their verdict upon one single testimony ; which thing the civil law admits not of.

Tenthly, another excellency of this trial is this ; that the judge is always present, at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them ; and also, in matters of fact, to give them a great light and assistance, by his weighing the evidence before them, and **OBSERVING WHERE THE QUESTION AND KNOT OF THE BUSINESS LIES** ; and by shewing them his opinion even in matter of fact ; which is a great advantage and light to lay-men. And thus, as the jury assists the judge in determining the matter of **FACT**, so the judge assists the jury in determining points of **LAW**, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges.

Eleventhly, when the evidence is fully given, the jurors **WITHDRAW** to a private place, and are kept from all speech with either of the parties, till their verdict is delivered up (*p*) ; and from

(*p*) The jury should attend to the cause, through the whole evidence, and when they withdraw from the bar, should so conduct themselves, in point

receiving any evidence, other than in OPEN COURT, where it may be searched into, discussed and examined. In this recess of the jury, they are to consider their evidence; and if any writings under seal were given in evidence, they are to have them with them;—they are to weigh the credibility of witnesses, and the force and efficacy of their testimonies; wherein, as I before said, they are not precisely bound to the rules of the civil law, viz.—“to have “TWO witnesses to prove every fact (*q*);” unless it be in cases of treason (*r*);—nor to reject one witness because he is single; nor always to believe two witnesses, if the probability of the fact does, upon other circumstances, reasonably encounter them (*s*): for the

of judgment, that when they return into court, and are demanded, “whether they are agreed,” to make answer by their foreman, the common conclusion of them all. This the law calls their VERDICT. “Duodecim viri (named) damnant vel absolvunt, sed non judicant, vel, ut nos dicimus, pene eos est facti probatio, vel improbatio; vel, in causa omni, quoad factum, decernunt, & ex eorum iudicio, quod veredictum dicimus, iudex vel iudices sententiam suam pronuntiant, & de jure pronuntiant.” Hickes, d. c. 40. m. d.

Stiernhook expresses himself in the following manner, on the confinement of an English jury:—“ad absolvendum vero vel condemnandum, in Anglia, necessitate compelluntur, atque eoque famelici et quasi captivi includuntur, nemine intromisso, donec absolventur seu condemnaverint.” De jure Sueonum et Gothorum, Holmiæ, 1672. cap. iv. p. 59. Of late time the jury do not withdraw, unless they have any doubt among themselves.

(*q*) By the civil law, where proof by witnesses may be received, it is necessary that there should be two of them at least.—Unius responsio testis, omnino non audietur. Cod. 4. 20. 9. One single witness, of what quality soever he may be, makes no proof. Dom. Civ. Law, 1 v. 450. But see Tholoas. Syntagm. Juris, lib. 48. cap. 13. sect. 9. Corvinus Enchirid. tit. de Testibus. Ulpianus, lib. 31. ad edict. Digest. lib. 22. tit. 5. Fortesc. de Laud. cap. 20, 32.—Waterhouse on Fortesc. 250. Plowd. 12. and the case of Shatter v. Friend, in 1 Show. 159. This the Civi-

lians seem to have received from the Jews. Deut. xix. 15. Matth. xviii. 16.

To extricate itself out of this absurdity, the modern practice of the civil law courts has plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though ever so clear and positive, *semi-plena probatio* only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to any single fact, they admit the party himself, (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called the *suppletory* oath; and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device, they satisfy at once the forms of the Roman law, and acknowledge the superior reasonableness of the law of England; a law which permits one witness to be sufficient, where no more are to be had; and to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa*.

(*r*) Sir John Kelyng, in his Reports of Pleas of the Crown, fo. 49. says, “it seems to me very plain, by the express words of stat. 1 Ed. 6. c. 12. that “at the common law, one witness was “sufficient in high treason.” But see 1 Ed. VI. c. 12. and 7 & 8 W. III. c. 3. s. 2. 4.

(*s*) Pref. to Coke’s third and eighth Report. Camd. Brit. clxii. clxix. Fort. in Pref. 10.

trial is NOT here simply BY WITNESSES, but by jury. Nay, it may so fall out, that the jury upon their OWN knowledge, may know a thing to be FALSE, that a witness swore to be true; or may know a witness to be incompetent, or incredible, though nothing be objected against him; and may give their verdict accordingly (*t*).

Twelfthly, when the whole twelve men are AGREED, then, and not till then, is their verdict to be received. And therefore the majority of assentors does NOT conclude the minority, as is done in some countries, where trials by jury are admitted. But if any one of the twelve DISSENT, it is NO verdict, nor ought to be received.

It is true, that in ancient times, as Henry II. and Henry III.'s time, yea, and by Fleta in the beginning of Edward I.'s time, if the jurors dissented, sometimes there was added a number equal to the greater party, and they were then to give up their verdict, by twelve of the old jurors and the jurors so added. But this method has been long time antiquated, notwithstanding the practice in Bracton's time, lib. 4. cap. 9. and Fleta lib. 4. cap. 9.—For at this day the entire number first impanelled and sworn are to give up an UNANIMOUS VERDICT, otherwise it is none (F.) And in-

(*t*) See Bushel's case, Vangh. 147. inferred from the several cases which are stated in the Abridgment alluded to. —It has been said, not from any great authority (5 New Abr. 292.) that there is no case in support of the above doctrine; and that the contrary may be to. The cases, however, do not in the least affect the principle which Hale has laid down.

(F) The unanimity of the twelve jurors in their verdict, must be admitted to be a singular institution. Perhaps the reason for requiring this, at least in criminal prosecutions, arose from compassion to the prisoner; against whom if the offence was not proved, beyond all possibility of doubt in the most scrupulous juror, it was thought an error on the side of mercy, that a single *voto* should acquit him. Another reason for this unanimity, might possibly have arisen from attainds being frequently brought in ancient times against juries, to which punishment every juror was liable; it was therefore reasonable that every one should have a power of dissenting, and not be concluded by the opinion of others. There is a passage, in Clarke's preface to the Laws of Hoel Dha, which, at the same time that it shews that this mode of trial was in use among the Welsh, accounts, in some measure, for the unanimity of the petit jury, which is not required from the grand jury. There are perhaps many Englishmen, and even lawyers, who do not know, that in Scotland the unanimity of a jury is not required, except in revenue causes before the court of Exchequer; and that the chancellor, or foreman, gives the verdict upon a majority of a single juror: they therefore consist of an odd number, viz. fifteen; and are

deed this gives a great weight, value and credit to such a verdict, wherein twelve men must unanimously agree in a matter OF FACT,

chosen out of five and forty returned by the sheriff; the pannel, or criminal, having a right to challenge, as by the English law. We find that the jury, consisting of an odd number, is a very ancient regulation in Scotland. "Such as be accused of any crime that deserves death, let them pass by the sentence of seven honest men, or else nine, eleven, or fifteen (a)." Fabian, in his Chronicle, gives a very particular account of the mayor and aldermen of London (b) claiming privileges in the reign of Henry the Third, viz. that for a trespass against the king, a citizen should be tried by twelve of his citizens; for murder, by thirty citizens; and for trespass against a stranger, by the oath of six citizens, and himself.

Sir Matthew Hale, in his *Historia Placitorum Coronæ* (c), treating of the demeanor of the jury, and how their verdict is to be given, remarks, that—"if there be eleven agreed, and one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven; nor the refuser fined or imprisoned; and therefore where such a verdict was taken by eleven, and the twelfth fined and imprisoned, it was upon great advice ruled that the verdict was void; and the twelfth man was delivered, and a new venire awarded." 41 Assiz. 11. For men are not to be forced to give their verdict against their judgment." He cites *P. 20 E. 1. Rot. 43. Norf. coram rege.*

Mr. Emlyn, who published the above work from the original manuscript of Sir Matthew Hale, and that at the instance of the house of commons (d), has paid particular attention to the passage just cited.—"Is it not," says Mr. Emlyn, "a force, when any of the jurors are obliged to comply under the peril of being starved to death; for how can it be expected that twelve considering men should, in all cases, happen to be of the same sentiments?—Therefore anciently it was not necessary (at least not in civil causes) that all the twelve should agree; but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion; and if, after such examination, both sides persisted in their former opinions, the court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum.*" Thus, in a great assise upon a writ of right, between the abbot of Kirkstede and Edmund de Eyncourt, eleven of the jury found for the abbot, and one for Edmund de Eyncourt. In this case, the verdict of the eleven was first recorded. "Robertus de Harblinge et omnes alii præter Radulphum filium Simonis dicunt super sacramentum suum, &c." Then follows the *dictum* of the twelfth. "Ex predictis Radulphus filius Simonis dicit super sacramentum suum, &c." Then follows the judgment. "Sed quia prædicti undecim concorditer et precise dicunt, quod præ-

(a) Law of Kenneth, mentioned by Boethius (Hollingshead's translation).

(b) These privileges claimed by the citizens of London are alluded to in a grant of king John's to the city of Lincoln, in the first year of his reign; "Concessimus etiam quod de placitis coronam tangentibus, se possint

dirationare (i. e. clear themselves) secundum consuetudinem civium civitatis Londoniæ." Rot. chap. 1mo Johannis regis, N. 35 Petyt. MS. vol. 1. p. 10.

(c) Vol 2. 297. ed. oct.

(d) Journ. 29 Novemb. 1680.

and none dissent. Though it must be agreed, that an ignorant parcel of men, are sometimes governed by a few, that are more knowing, or of greater interest or reputation than the rest.

“dictus Abbas et ecclesia sua prædicta majus jus habeant tenendi, &c. ideo
“consideratum est, quod prædictus Abbas et successores sui teneant prædicta
“tenementa de cætero in perpetuum, &c.” Placita coram justic’ itinerant’
in com’ Lincoln anno 56 H. 3. Rot. 29. in dorso.

In an assize of novel disseisin, between William Tristram, plaintiff, and John Simenel and others, defendants; where the whole jury consisted of only eleven; ten found for Tristram, and one for Simenel; and both verdicts are recorded in this manner. “Decem jurati dicunt, quod, &c. et undecimus juratorum, scilicet Johannes Kineth, dicet, &c. Et quia dicto majoris partis juratorum standum est, consideratum est, quod prædictus Willielmus recuperet seisinam suam de prædictis tenementis versus prædictos Johannem et alios per visum recognitorum, et dampna quæ taxantur per jur. ad duas marcas, et Johannes et alii in misericordia.” Pas. 14 E. 1. Rot. 10. coram rege.

The like practice is supposed, in the case above quoted by Sir Matthew Hale; Pas. 20 E. 1. Rot. 43. coram rege; which was thus: Martin Fitz-Osbert recovered seisin of certain lands in West-Somerton, against the prior of Buttelye, before John de Lovetot and William de Pageham, judges of assize, in Norfolk, anno 16 E. 1. The prior afterwards complained greatly, that injustice had been done him by Lovetot, at the said assize, and thereupon the bishop of Winchester and others were ordered to hear the matter, and to do justice to the prior. Upon this Lovetot and Pageham were called before the bishop, &c. and the prior objected to Lovetot, “quod fieri fecit falsam irrotationem in rotulis suis, et contrarium veredicto juratorum assise prædictæ, &c. et hoc paratus est verificare per prædictos juratores, qui omnes sunt superstites, &c.” To which Lovetot and Pageham replied, by justifying themselves, and insisting “quod bene et ritè processerunt ad captionem illius assise, unde vocant recordum rotulorum suorum, &c.” In which the judgment pronounced by Lovetot was entered in the following manner. “Et quia per prædictam assisam convictum [compertum] fuit, quod Edricus, de quo prædictus Martinus exivit, fuit liber homo et libertæ conditionis; et quamvis ipse Edricus, et exitus de ipso proveniens tenuissent de prædicto priore et de prædecessoribus suis, tenementa sua in villenagio, et per villana servitia, hoc eis non præjudicat, quo minus corpora sua sint libera; eo quod nulla præscriptio temporis potest liberum sanguinem in servitutem reducere, ideo consideratum est, quod prædictus Martinus recuperet inde seisinam suam, &c. Et Johannes de Pykering unus recognitorum præfatæ assise, pro eo quod in veredicto præfatæ assise, narrando illud veredictum contrarius fuit omnibus aliis recognitoribus, narrando aliud quam inter illos fuit provisum, sicut per examinationem eorum convictum [compertum] fuit, et mancaptus est per, &c. ideo ipse et mancapti sui in misericordia. Et præceptum est vic’, quod capiat prædictum J. de Pykering, et salvo, &c. ita quod habeat corpus ejus apud Kenteford, &c. ad faciendum redemptionem suam pro transgressione prædicta.” The bishop of Wynton and his fellows then proceeded to ex-

Thirteenly, but if there be matter of law that carries in it any difficulty, the jury may, to deliver themselves from the danger of an attaint, find it **SPECIALLY**; that so it may be decided in that

mine Lovetot and Pageham touching the said judgment. “ Et quia in consideratione super veredicto primæ assisæ compertum est, quod J. de Pyke-
 “ ring unus recognitorem prædictæ assisæ, narrando illud veredictum, con-
 “ trarius fuit omnibus aliis recognitoribus, narrando aliud quam inter eos fuit
 “ provisum; et nichil de illo contrario in recordo prædicto specificatur sive
 “ declaratur; immo quod veredictum captum fuit et receptum, ac si omnes
 “ de uno et de eodem assensu fuissent in veredicto prædicto; nec etiam veredictum
 “ ipsorum undecim declaratur sive specificatur, &c. nec duodecimus
 “ ab undecim fuit separatus, nec examinatus per se; nec undecim a duodeci-
 “ mo fuerunt separati, nec per se examinati, &c. PROUT MORIS EST IN TALI
 “ CASU; et sic ex contrario veredicto subsecutum fuit iudicium non legi sive
 “ consuetudini regni consonum, videtur manifestè, quod recordum illud non
 “ est plenum, seu perfectum, in hoc casu, &c. Concordatum est quod assisæ
 “ prædicta re-examinetur, &c.” Upon this the sheriff was ordered, “ quod
 “ venire faciat hic, &c. recognitores assisæ prædictæ, et quod scire facias
 “ Martin to appear at the same day, ad audiendum, &c. Postea ad prædictam
 “ diem venerunt recognitores assisæ prædictæ. Et quia prædicti Johannes et
 “ Willielmus aliud recordati fuerunt, quam compertum fuit per recordum
 “ rotulorum ipsius Johannis; et etiam quia juratores prædicti minus suffi-
 “ enter fuerunt examinati super articulis prædictis, sicut patet in recordo præ-
 “ dicto, iterato fuerunt juratores jurati et examinati; qui dicunt super sacra-
 “ mentum suum, quod prædictus Martinus fuit villanus ipsius prioris die quo
 “ ejectus fuit de prædictis tenementis, &c. Et quia compertum est, &c. et
 “ quod prior ad prædictam assisam coram præfatis J. & W. respondebat per
 “ ballivum suum, qui quidem ballivus non potuit deducere in iudicium jus
 “ sanguinis natavi domini sui, absque præsentia domini sui, &c. ac etiam in
 “ supradicto recordo, quod nulla præscriptio longi temporis potest liberum
 “ sanguinem in servitutem reducere, quod omnino falsum est, &c. videtur,
 “ quod iudicium de Lovetot erroneum est: Ideo consideratum est, quod
 “ prædictus prior rehabeat prædicta tenementa, ita quod omnia sint in eodem
 “ statu, in quo fuerunt ante captionem prædictæ assisæ.” Afterwards by
 “ writ of error, the record coram episcopo Winton et sociis suis auditoribus quere-
 “ larum was brought coram rege; and Martin Fitz Osbert assigned for error,
 “ that he had recovered seisin against the said prior “ in grosso veredicto su-
 “ per disseisinâ secundum legem communem; et auditores sine brevi regis
 “ inde eis directo, et sine aliquâ præmuntione ipso Martine rite factâ, contra
 “ legem communem, ipsum à prædicto tenemento abjudicaverunt, et contra
 “ tenorem Magnæ Chartæ domini regis: Dicit insuper quod prædicti audi-
 “ tores venire fecerunt coram eis juratores præfati assisæ in formâ certifica-
 “ tionis, et ipsos juratores per sacramentum suum re-examinaverunt, et ad-
 “ miserunt veredictum eorum contrarium veredicto per ipsos prius pronun-
 “ tiato; unde dicit, quod in iis et aliis erratum est, &c.” To this the prior
 “ replied, that Martin had been “ præmunitus per breve quod vocatur scire
 “ facias; et quod prædicti auditores habuerunt plenam potestatem, tam per

court where the verdict is returnable (u). And if the judge overrule the point of law, contrary to law, whereby the jury are persuaded to find a general verdict—which yet they are not bound to do, if they doubt it,—then the judge, upon the request of the party desiring it, is bound by law, in convenient time, to seal a bill of exceptions, containing the whole matter excepted to; that so the party grieved, by such indiscretion or error of the judge, may have relief by writ of error, on the statute of Westminster 2.

Fourteenthly, although upon general verdicts given at the bar in the courts at Westminster, the judgment is given WITHIN FOUR DAYS, in presumption that there cannot be any considerable

(u) The danger of an *ATTAINT* is now merely imaginary; nor need the jury, unless perhaps in criminal or important civil cases, find *SPECIALLY*; the courts of law having of late years, to forward the ends of justice, been accustomed, on motion, to grant *NEW TRIALS*, where the jury, or the judge, have been mistaken, or misled. 4 Bur. 2108. 3 Bur. 1669. This mode was introduced about the middle of the seventeenth century, 10 Mod. 202. but is now carried to an immoderate excess.

“breve domini regis, quam per speciali præceptum domini regis, ad corrigenda recorda justiciariorum vitiosa et erronea inventa; et hoc satis constat domino regi et ipsius consilio, et quod prædictus Martinus non recuperavit per grossum veredictum; quia non fuit ibi veredictum nisi tale quale imperfectum, quia per XI. juratores captum; et quod prædicti auditores non admiserunt contrarium veredictum priori veredicto, quia veredictum prius captum eorum J. de Lovetot fuit tale quale imperfectum, et contra legem terræ captum per XI. juratores, de statu sanguinis ultra tempus limitatum; secundum veredictum magis deberet dici suppletio prioris veredicti defectivi, quam eidem contrariari.” To which Martin rejoined, and insisted, “quod prædicta assisa fuit plena et perfecta coram J. de Lovetot et sociis suis justic. capta, et hoc liquet expresse in eodem recordo, ubi dicit jurati dicunt, &c. Et quod ipse recuperavit prædicta tenementa per grossum veredictum præfatæ assisæ, petit judicium, si prædictum grossum veredictum super disseisinâ præcisè factâ aliquo modo secundum legem et consuetudinem regni Angliæ debet adnichillari, absque brevi de attinctâ, &c.”

The judgment in this case does not appear, but it seems, that the reason why the record of the verdict is said to be imperfect, was not because all the twelve did not agree, but because the *dicta utriusque partis* were not distinctly specified and recorded, which is declared to be the usage in such case; “*prout moris est in tali casu.*”

Is it possible to contend after this, that the trial by *TWELVE* jurymen was thoroughly introduced, or are there any passages, in the old historians, which clearly prove it to have been so established, before the time of Henry the Third (c)?

(c) Barr. on stat. 21.

surprise in so solemn a trial, or at least it may be soon espied; yet upon trials, by *nisi prius*, in the country, the judgment is not given presently by the judge of *nisi prius*, unless in cases of *QUARE IMPEDIT*: but the verdict is returned, after trial, into that court from whence the cause issued; that thereby, if any surprise happened, either through much business of the court, or through inadvertency of the attorney, or counsel; or through any miscarriage of the jury; or through any other casualty; the party may have his redress in that court from whence the record issued.

And thus stands this excellent order of trial by jury; which is far beyond the trial by witnesses, according to the proceedings of the civil law, and of the courts of equity, both for the certainty, the dispatch, and the cheapness thereof. It has all the helps to investigate the truth that the civil law has, and many more. For, as to certainty,

First, it has the testimony of witnesses, as well as the civil law, and equity courts.

Secondly, it has this testimony in a much more advantageous way than those of courts, for discovery of truth.

Thirdly, it has the advantage of the judge's observation, attention, and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.

Fourthly, it has the advantage of the jury, and of their being *de vicineto*; who oftentimes know the witnesses and the parties (x): and,

Fifthly, it has the unanimous suffrage and opinion of twelve men: which carries in itself a much greater weight and preponderation, to discover the truth of a fact, than any other trial whatsoever.

And as this method is more certain, so it is much more expeditious and cheap. For oftentimes the session of one commission for the examination of witnesses, for one cause, in the ecclesiastical courts, or courts of equity, lasts as long as a whole session of *nisi prius*, where a hundred causes are examined and tried.

And thus much concerning trials in CIVIL CAUSES. As for trials in causes criminal, they have this further advantage, that regularly the accusation, as preparatory to the trial, is by A

(x) The jury now only come *de corpore comitatus*, and not *de vicineto*. See 4 & 5 Ann. c. 16.—24 Geo. 2. c. 18. and note (B) on this chapter.

GRAND JURY (y). So that as no man's interest, according to the course of the common law, is to be tried or determined without the oaths of a jury of twelve men; so no man's life is to be tried but by the oaths of twelve men, and by the PREPARATORY ACCUSATION or indictment by twelve men, or more, PRECEDENT to his trial; unless it be in the case of an appeal, at the suit of the party (z) [as to which, see pa. 125. 145.].

(y) See Hale's *Historia Placitorum Coronæ*—Hawkins's Pleas of the Crown, and the twenty-third chapter of the fourth book of Blackstone's Commentaries.

(z) Mr. Justice Blackstone conceives that there are some few defects in this mode of decision, and which he enumerates in the conclusion of the twenty-third chapter of the third book of his Commentaries. But should those defects continue unremedied and unsupplied, "still, (continues this

learned judge), with all its imperfections, I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that ever was established in any country."—"The only complaint I have ever heard uttered against it (says De Lolme) has been by men, who, more sensible of the necessity of public order, than alive to the feelings of humanity, think that too many offenders escape with impunity."

THE END.

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AN
A N A L Y S I S
OF THE
CIVIL PART
OF THE
L A W.

BY
SIR MATTHEW HALE.

THE SIXTH EDITION.

Of all the schemes hitherto made public for digesting the
Laws of England, the most natural and scientific of any,
as well as the most comprehensive, appeared to be that of
Sir MATTHEW HALE, in his posthumous "Analysis of
the Law."

Mr. Justice BLACKSTONE's Pref. to his Analy.



THE
AUTHOR'S
P R E F A C E.

IN the ensuing TRACTATE, I shall make an essay of reduction of the several titles of the law into distributions and heads according to an analytical method; but the particulars thereof are so many, and the connections of things so various therein, that as I shall before-hand confess that I cannot reduce it to an exact logical method, so I must declare that I do not despair at the first, yea, the second or third essay, to reduce all the considerable titles thereof under this method. But many things will be omitted, and possibly therefore, as they shall occur to my memory, will perchance be

THE PREFACE.

disorderly shuffled in under such of the distributions as may not be so proper for them,—or at least inserted brokenly, without their just dependence,—till upon a second or third, or, perhaps, further essay, the scheme or abstract may be entirely new framed.

HOWEVER, the following essay will do thus much good.

FIRST, it will discover that it is not altogether impossible, by much attention and labour, to reduce the Laws of England at least into a tolerable method or distribution.

SECONDLY, it will give opportunity both to myself and others, as there shall occur new thoughts or opportunities, to rectify and to reform what is amiss in this, and to supply what is wanting; whereby, in time, a more methodical system or reduction of the titles of the law, under method, may be discovered.

THE PREFACE.

THIRDLY, that although, for the most part, the most methodical distributors of any science rarely appear subtle or acute in the sciences themselves ;—because, while they principally study the former, they are less studious and advertent of the latter ;—yet a method, even in the common law, may be a good means to help the memory to find out MEDIA of probation, and to assist in the method of study.

AND although the laws of England are generally distributed into the common law, and statute law, I shall not distribute my Analysis according to that method, but shall take in and include them both together, as constituting one common bulk or matter of the laws of England. Nor shall I confine myself to the method, or terms, of the civil law, nor of others who have given general schemes and analyses of laws ; but shall use that method, and those words or expressions, that I shall think most conducive to the thing I aim at.

THE PREFACE.

The laws of this kingdom do respect either,

Civil rights; or,

Crimes and misdemeanors.

THIS I shall substitute as the general matter of the Laws of England; not troubling myself with criticisms or propriety of words, in which respect the very word CIVIL includes also matters criminal; because civil constitutions give the denomination of crimes, and the rules and method of their punishment: but it shall be sufficient that I use such expressions as either are in themselves proper to express the thing I mean, or that, by my usage and application of them, I render serviceable to that purpose and end.

I SHALL therefore divide the Laws of this kingdom, in relation to their matter, into two kinds.

1. THE civil part, which concerns civil rights, and their remedies.

THE PREFACE.

2. THE criminal part, which concerns crimes and misdemeanors.

AND these, to avoid confusion, I shall dispose into several sections.

AND first, I begin with the Law as it relates to civil matters.



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THE
ANALYSIS
OF THE
LAW.

SECT. I.

Of the civil part of the law, IN GENERAL.

THE civil part of the law concerns,

Civil rights or interests :

Wrongs or interests relative to those rights :

Relief, or remedies applicable to those wrongs.

Now all civil rights, or interests, are of two sorts ;—

Jura personarum, rights of persons : or,

Jura rerum, rights of things.

The civil rights of persons are such as do either,

Immediately concern the persons themselves : or,

Such as relate to their goods and estate.

As to the persons themselves, they are either,

Persons natural ; or,

Persons civil or politic ; i. e. bodies corporate.

Persons natural are considered two ways :

Absolutely and simply in themselves ; or,

Under some degree or respect of relation. Vide Sect. II.

[c]

In persons natural, simply and absolutely considered, we have these several considerations, viz.

The INTEREST which every person has in himself.

Their CAPACITIES, or ABILITIES, which respect their actions.

The interest which every person has in himself principally consists in three things, viz.

The interest he has in the safety of his own person. And the wrongs that reflect upon that, are, assaults—affrays—woundings.

The interest he has in his liberty, or the freedom of his person. The injury whereto, is duress, and unlawful imprisonment.

The interest he has in his name and reputation. The injury whereto is scandal and defamation.

As to the other interest of goods and estate, though in truth they have a habitude, and are under some respect to the person; yet because they are in their own nature things separate and distinct from the person, they will more properly come in under *jura rerum*. Vide Sect. XXIII. &c.

The CAPACITY that every person has, which is a power that THE LAW variously assigns to persons, according to the variety of certain conditions, or circumstances, wherein they are; either TO TAKE or TO DISPOSE.

And under this head we have,

First, the capacities themselves, which are especially two;

Capacities which a man has in his own right:

Capacities which he has *in auter droit*, or another's right.

Now capacities which a man has in his own right, are either,—

To acquire or take;

To alien or transfer.

And both these are either,

Of things personal;

Of things real.—

The second kind of capacities are in *IN AUTER DROIT*,—another's right; as executors, corporations, *cestuy que use*, &c. whereof hereafter.

The various conditions or circumstances of persons, with relation to those capacities, consisting of,

Ability,

Non-ability.

And all persons are presumed in law able in either of those former capacities of taking, or disposing, who by law are not disabled : and those that are so disabled come under the title of non-ability, though that non-ability is various in its extent, viz. to some more, to some less ; as in the several instances following.

ALIENS : here comes in the learning of aliens, as naturalization, denization, &c.

ATTAINTED of treason or felony ; here of attainders.

Persons OUTLAWED in personal actions.

INFANTS ;—here of the non-ability of infants.

Bacon's
Hist. part
1. p. 88.

FEME COVERTS ; here of their disability.

Vide § xiv.

IDEOTS and LUNATICS ; here of that learning.

Persons under some ILLEGAL restraint or force, as duress, maness.

VILLEINS (now antiquated).

BASTARDS ; and here of legitimation.

Vide § xviii.

SECT. II.*Of the relation of persons, and the rights thereby arising.*

Now as to persons considered in respect of relation, the rights thereby arising are of three kinds, viz.

Political,

Æconomical ;

Civil.

The political relation of persons, and the rights emergent thereupon are,

The magistrate ;

The people or subject.

The magistrate is either,

Supreme ;

Subordinate.

The supreme magistrate is either,

[C 2]

Legislative: THE PARLIAMENT. (With whose rights I shall not here intermeddle.)

Executive: THE KING.

And inasmuch as the king is by the law the head of the kingdom and people, the laws of the kingdom, *eo intuitu*, have lodged in him certain rights, the better to enable him to govern and protect his people. And although under this consideration I shall be constrained to take in and include many rights of things; yet because they do belong to the king under this relation, **AS KING**, and I have no other place or division so apt to dispose of them as this, I shall here bring them in together.

And the rights that belong to the king, as king, are of two kinds;

Such rights as concern his person:

Such rights as concern his prerogative.

Of each of these in their order.

SECT. III.

Of such rights as relate to the king's person.

THE rights which more immediately concern the king's person include these two things, viz.

The manner of his title, or acquest thereof.

The capacities of the king.

The manner of acquest of the regal title, or dignity, is either,

A lawful acquest; or,

An unlawful acquest.

An hereditary acquest of title is by the municipal laws and constitutions of this kingdom, when the crown descends to the next of blood, according to the laws and customs of England in cases of hereditary descents.

And here all those rules that have been observed in the law touching this point, may be inserted.

An unlawful acquest of the regal title is,—

By usurpation; when a subject by wrong invades the crown

or intrudes upon him who has the lawful right thereto; as was done by king Stephen, king John, Henry the fourth, and Richard the third.

And herein may be considered what power the law allows to such an usurper, and what it denies him.

By conquest; when a foreigner either,

Vanquishes the king, as William the first did Harold. Victoria in regem.

Or subjects the kingdom; which never happened with respect to England since the Romans. Victoria in populum.

The king's capacity, as he is king, is of two kinds.

His political capacity.

His natural capacity.

As to his political capacity; he is A SOLE CORPORATION, of a more transcendant nature and constitution than other corporations; whereby he is discharged from many incapacities, which in the case of other persons would,—

Obstruct his succession, as alienee, &c.

Disable his actions, as infancy, or coverture in the case of a queen, &c.

Then, as to his natural capacity, as he is king: the great concerns of government requiring a great assistance to the king's natural capacity, the laws and customs of the kingdom have furnished him with divers assisting councils, which are of two kinds, viz.

His ordinary councils,

His extraordinary councils.

His ordinary councils are three, viz.

Privatum concilium, his privy council.

And here may be taken in, all such laws as direct, bind, or limit the privy council; either,

In matters of public interest touching the king;

Or in matters of private interest between party and party.

Legale concilium, or his council at law; which consisting of the lord chancellor, lord treasurer, lord privy seal, judges of both benches, barons of the exchequer, master of the rolls, &c. is the king's council of advice in matters of law.

Concilium militare, his council in time of war, or public hostility, viz.

In matters at land, { earl constable.
 { earl marshal.

In matters at sea, the lord admiral.

The jurisdiction of whom, *vide post*.

The king's extraordinary councils are of two kinds ;

Secular, or, temporal :

Ecclesiastical, or, spiritual.

The king's extraordinary secular councils are, the house of peers ; the house of Commons ; in their capacity of informing, advising, and counselling the king in matters that are,

Public benefits ;

Public grievances.

And here all the learning of parliaments properly comes in, viz. the persons of whom it consists ; the members of each house ; the manner of their summons ; the places that send members to the house of commons ; and how to be qualified ; how elected ; the qualifications of the electors ; what the privileges of parliament are ; the method of passing bills, &c. and how adjourned, prorogued, or dissolved.

The extraordinary ecclesiastical councils are,

The upper house	} of convocation.
The lower house	

And hither may be referred all laws and constitutions touching the convocation.

SECT. IV.

Concerning the prerogatives of the king.

HAVING shewn you what rights belong to the king's person, we come now to those rights which concern his prerogative.

And those prerogatives are of two kinds :

Direct and substantive prerogatives.

Incidental and relative prerogatives.

The direct and substantive prerogatives may be distributed under three branches, viz.

Jura majestatis, vel summi imperii, i. e.

The right of dominion.

Potestas jurisdictionis, vel mixti imperii, i. e.

The power of jurisdiction.

Census Regalis, or, the royal revenues.

Which I shall subdivide according to their order.

See the incidental and relative prerogatives in Sect. IX.

SECT. V.

Concerning the king's rights of dominion or power of empire.

THE *jura summa majestatis*, or rights of the king's empire or dominion, are either,

In relation to his own subjects; or,

In relation to foreigners.

In relation to his own subjects, they respect,

Times of peace.

Times of war.

And first of the rights of dominion, which respect times of peace.

These rights, though they are exercisable also, in times of war and insurrection, yet seeing they do more immediately respect the well-ordering of a kingdom, and preserving its peace and tranquillity, I shall here insert them. And though they are various in their kinds, and some of them seem to refer to the powers of jurisdiction, yet I shall endeavour to reduce them to these eight heads following, viz.

His rights in relation to the laws.

In relation to tributes and public charges.

In relation to the public peace of the kingdom.

In relation to public injuries and oppressions.

In relation to public annoyances.

In relation to his constituting the great officers of the kingdom.

In relation to his ordering and regulating trade and commerce.

In supervising, regulating, and supplying the defects of others.

First, in relation to the laws of this kingdom :

In the making of laws.

In the relaxation of laws.

As to the making of laws, his right consists in three particulars :

In the making of statute laws, or acts of parliament ; for though the king cannot make such laws himself without the consent of both houses of parliament, yet no law can be made to bind the subject without him.

In the making of spiritual laws, or canons ecclesiastical, which, if kept within the bounds of ecclesiastical cognizance, are admitted here in this kingdom : as these laws cannot be made without the king's consent, so neither can the king ordain such laws without the clergy in convocation assembled.

So that in both these kinds of laws, the king's power of making is only a qualified and co-ordinate power. But,

In making and issuing of proclamations, which in some instances are to be taken for laws, as in calling parliaments, declaring war, &c. herein the king's power is more absolute, as being made by him alone; yet the king cannot by these introduce a new law, so as to alter or transfer properties, or impose new penalties or forfeitures beyond what are established by statute or common law.

And as to his power in the relaxation of laws already made, it respects either,

Temporal laws ; which being enacted by parliament, the king cannot abrogate or annul such a law : but in some cases of penal laws, he may, in respect of persons, times, or places, sometimes DISPENSE with them (a).

Here may come in all the learning touching dispensations and *non obstantes*.

Ecclesiastical laws, wherein the king has a greater latitude of dispensation ; for if such laws are not confirmed by parliament, the king may revoke and annul them AT HIS WILL and pleasure.

(a) The dispensing power of the crown was abolished at the time of the Revolution. Hume's Hist. 8 v. oct. 240, 244, 245, 247, 249. Blac. Com. 1 v. oct. 142, 186, 342. 4 v. oct. 436, 440. 1 W. & M. s. 2. c. 2.

Though these particulars, and some of the foregoing, more regularly come in under pleas of the crown, and criminal matters, in the Second Part of this Treatise.

Sixthly, in relation to his constituting great officers, viz.

CIVIL OFFICERS, as lord chancellor, treasurer, privy-seal,
earl marshal, lord admiral, judges, &c.

And here may be considered,

The manner of their constitution.

Their office, business, or employment.

ECCLESIASTICAL OFFICERS, as archbishops, bishops, deans,
archdeacons, &c.

And here may come in,

The manner of their constitution ;—as their election, con-
secration, investiture, restitution of temporalities, &c.

The exercise of their office ; viz. how far the king may
enlarge, limit, or restrain it.

Seventhly, in relation to the regulation of trade and commerce.

1. His right of { Coining new monies,
Authenticating foreign coin.

And here comes in all matters touching the variety and legality
of coins ; and of contracts, orders, and instructions, relating
to it.

2. His designation of places of public commerce ;

As ports, fairs, markets.

And here of such various learning as relates thereto ;

As how they are created, { By charter.
By prescription.

What is a good grant thereof, and what not, if granted to the
prejudice of another ; and of the writ *Ad Quod Damnum*.

Also what is a sale in market overt, and of the effects thereof in
altering properties, &c. and of forestalling, as when a market
may be forestalled, and when not.

3. His right in instituting and regulating the instruments of pub-
lic commerce, with respect to

Undue { Weights.
Measures.

Excessive prices, &c.

Eighthly, in relation to his supervising, regulating, and sup-
plying the neglects or defects of other magistrates ;

Of CIVIL magistrates { By writs of error.
By writs of appeal, &c.

Of ECCLESIASTICAL magistrates ; by devolution.

Of causes, by appeal to him.

Of presentations, by lapse.

Thus far of the king's prerogatives, with respect to peace ; next to those that relate to war and commotions.

These may be termed *jura militiae*, and consist,

In raising men,

In building forts.

And regard either,

Domestic insurrections of his subjects : or,

Foreign hostilities of enemies.

With regard to his subjects,

He may raise men to suppress their insurrections by force.

He may punish them by martial law during such insurrection or rebellion, but not after it is suppressed.

In relation to foreigners :—these rights are to be considered, viz.

The power of denouncing war, and concluding peace.

And herein leagues and truces may be considered, with their various effects.

Also what shall be said an enemy.

The authorizing of,

Public envoys ;

Ambassadors ; and,

Plenipotentiaries.

The power of granting or issuing letters of marque and reprisal.

And herein consider the inducements, ends, and effects thereof.

The power of granting safe-conducts.

And here of the uses and effects thereof.

SECT. VI.

Of the potestas jurisdictionis ; or the king's right or power of jurisdiction.

HITHERTO of the *jura summi imperii*, or rights of empire or dominion ; now we come to the *jura mixti imperii*, or *potestas jurisdictionis*, wherein the king generally acts by his delegates, officers or representants.

This *potestas jurisdictionis*, or power of jurisdiction, seems principally to be of two kinds, viz.

Extraordinary.

Ordinary.

The extraordinary power of jurisdiction residing in the king, though for the most part exercised by his officers and ministers, consists in three things ;

In commanding home any of his subjects from foreign parts ;

In prohibiting any of his subjects from going beyond the seas :

1. By proclamation.

2. By the special writ of *Ne Exeat Regnum*.

2 Inst. 47,
48.

In commanding any of his subjects to undertake an office or dignity within the realm.

And here the learning touching these may be inserted, as where, when, and how these commands or instructions are to issue ; and when, and in what cases NOT ; what the penalty if not obeyed, and in what manner inflicted.

The king's ordinary or usual power of jurisdiction, is of two kinds :

Ecclesiastical.

Temporal or civil.

Ordinary ECCLESIASTICAL jurisdiction, or rather jurisdiction touching ecclesiastical matters, anciently belonged to the crown, but was for some time usurped by the pope ; so by the statute of 26 Hen. VIII. it was again restored to the crown.

And this is of two kinds ;

Voluntary jurisdiction.

Contentious jurisdiction.

Ecclesiastical VOLUNTARY jurisdiction may be exercised by the king in several instances relating to ecclesiastical matters: as,

In convening ecclesiastical assemblies, as synods, convocations, &c.

In such acts of voluntary ecclesiastical jurisdiction, wherein the king has a power to concur with the ordinary.

And in many cases, to do what the ordinary CANNOT do; as in constituting appropriations, uniting of churches, erecting ecclesiastical benefices or dignities, dispensing with irregularities, exempting from ecclesiastical jurisdiction, with relation to his free chapels; in pardoning crimes relating to ecclesiastical jurisdiction, and the execution of their sentences, WHEREIN A PRIVATE INTEREST IS NOT CONCERNED; in suspending the effects of their sentences (even) in causes criminal; and an infinite more of the like nature.

This is a large field full of many titles, and of various learning.

As to ecclesiastical CONTENTIOUS jurisdiction: it is true, the king meddles not with it as to the exercise thereof; for that would be both an injury to the excellency of his majesty, and also a wrong to the subjects in depriving them of their right of appeal, if there be cause for the same; for if the king should be the judge upon the FIRST instance, the party cannot afterwards appeal.

And therefore in cases of ecclesiastical CONTENTIOUS jurisdiction, his power is exercised by way of INTERPOSITION, in three instances, viz.

By his power of { *Jurisdictionem ordinariam, et jurisdictionem delegatam,*

To commissioners of his own nomination under the great seal.

By suspending their proceedings; which is done, not by his immediate authority, but by the administration of his temporal courts, who, by a power derived from the king, suspend their proceedings BY PROHIBITION,—if there be cause.

By the last devolution of appeal; wherein, though the king himself does not judge IN PERSON, yet he appoints com-

missioners under the great seal to receive and determine the appeal.

And thus much of the king's ecclesiastical jurisdiction.

Now as to the TEMPORAL or CIVIL jurisdiction of the king : this, as well as his ecclesiastical jurisdiction, is of two kinds, viz.

Voluntary.

Contentious.

His voluntary TEMPORAL jurisdiction consists,

In erecting of courts by his great seal ; so that they be courts of the common law ; for a court of equity **CANNOT** be now erected, but by act of parliament.

In the erection and collation of,

Jurisdictions.

Regalities.

Liberties.

Franchises.

Exemptions.

Privileges : and,

Dignities.

In erecting and collating of jurisdictions, viz.

Exempt jurisdictions.

Non-exempt jurisdictions.

Exempt jurisdictions ; as the jurisdiction of counties palatine, jurisdiction not to be impleaded *extra muros*, consuance of pleas, &c.

Non-exempt jurisdictions ; as leets, torns, power to hold pleas, &c.

In the collation of regal powers ; as of coining money, pardoning offenders, constituting justices, &c.

But see how far these are resumed by stat. 28 Hen. VIII.

In the collation of liberties ; as forests, parks, chases, warrens, ferries, gaols, return of writs, ports of the sea, fairs, markets, tolls, and many others of like nature.

In the collation of franchises ; as creating of free boroughs, giving power of sending burgesses to parliament, creating and dividing counties, erectings of corporations.

In exemptions of all kinds ; as from suit at the county, torn, or hundred court ; also from serving on juries, and from paying tolls, customs, subsidies, &c.

In the collation of privileges ; as endenization of aliens, privileges against arrests and imprisonment, and enfranchising villeins by his presence formerly.

In the creation and collation of dignities ; as dukes, marquisses, earls, viscounts, barons, &c.

And thus far of the king's temporal voluntary jurisdiction.

As to the king's temporal CONTENTIOUS jurisdiction before-mentioned, this is not exercised by the king in his own proper person, for the reasons before given in the head of ecclesiastical contentious jurisdiction ; for though instances have been of the king of England sitting in the court of king's bench, and though the stile of that court is *coram rege*, and the chief justices there were anciently called *locum tenentes domini regis*, yet, when the king sat there in person, the judgment or opinion of the court was always given by the justices.

The king always exercises this contentious temporal jurisdiction by his judges or justices, which he creates or constitutes four ways :

By WRIT, as the chief justice of the king's bench.

By PATENT, as the ordinary judges of the established courts at Westminster.

By COMMISSION, as justices of *oyer and terminer*, gaol-delivery, assize, and *nisi prius*. Vide infra.

By CHARTER, as the judges in courts of corporation and inferior courts (*b*).

(b) To maintain both the dignity and independence of the judges in the superior courts, it is enacted by 13 W. III. c. 2. that their commissions shall be made (not, as formerly, and in the time of Sir Matthew Hale, *DURANTE BENE PLACITO*, but) *QUAMDIU BENE SE GESSERINT*, and their salaries ascertained and established. But see 1 Geo. III. c. 23. and Blac. Com. 1 v. oct. 267.

SECT. VII.

Concerning the census regalis; or, the king's royal revenue (c).

I COME now to speak of the CENSUS REGALIS, or the king's royal revenue; and here I shall not say much of his houses, manors, lands, fee-farms, or free rents, because these are common to him with other persons; but I shall only speak of his royal revenue, or CENSUALES PRÆROGATIVÆ, and that CENSUS REGALIS, of which the law takes notice as of common right belonging to him, AS HE IS KING.

And the kinds of those revenues are two, viz.

Ecclesiastical.

Temporal.

His ecclesiastical revenues are of two kinds :

Extraordinary.

Ordinary.

His extraordinary revenues ECCLESIASTICAL are those subsidies and tenths, and other ecclesiastical supplies granted occasionally by the clergy in their several convocations.

Note, In those OCCASIONAL supplies the law takes notice, that the king has an inheritance, though depending upon the bounty of his subjects, and therefore he may grant an exemption from them : as likewise he may do to particular persons from temporal subsidies, hereafter mentioned, for the same reason.

His ordinary revenues ECCLESIASTICAL are likewise of two kinds :

Constant, or annual.

Contingent, or casual.

The constant or annual revenue ecclesiastical is his tenths of ecclesiastical benefices, extra-parochial tithes, and some other things of ecclesiastical nature, that possibly might come to him by the dissolution of monasteries.

(c) As to the royal revenue, upon the footing on which it AT PRESENT stands, see the eighth chapter of the first book of Blackstone's Commentaries.

Hither may be referred proxies, (procurations,) pensions, tithes, appropriations, &c.

The casual, or uncertain, ecclesiastical revenues are,

His first-fruits of all the ecclesiastical benefices; settled in him by stat. 26 Hen. VIII.

The temporalities of bishops; which though they are in the crown by reason of the king's right of patronage, yet I may call them SPIRITUAL, because they are part of the revenues of an ecclesiastical corporation: and on the same reason, Corrodies also; as being the foundation of ecclesiastical corporations.

And also lapse itself; which though it be not reckoned a revenue, because not to be sold, yet it is EQUIVALENT to a revenue; for it yields a preferment for his clerk.

SECT. VIII.

Of the king's temporal revenue.

I COME now to that part of the king's *census regalis* which I call TEMPORAL: and this is likewise of two kinds;

Extraordinary.

Ordinary.

The extraordinary TEMPORAL revenue may be further divided into,

The ancient.

The modern.

The ancient temporal extraordinary revenues are, of several

Rushw. col. kinds, as,
vol. i. p. 481. Hidage, cornage, scutage.

Aids: *ad corpus redimendum, ad filium, primogenitum militem faciendum, ad filiam primogenitam maritandam.*

The modern are the subsidies and supplies granted by parliaments.

The ordinary *census regalis* TEMPORALIS is also of two kinds, viz.

Common.

Special.

The COMMON *census regalis temporalis* is either, certain, or casual.

Certain; as his rents and demesnes; which are either,

Newly acquired by dissolution, surrender, exchange: or,

Ancient; as, *antiqua dominia coronæ*, i. e. ancient demesnes.

Here insert what they were, what the tenants privileges were, &c.

The CASUAL ordinary temporary revenues; as, profits of his tenures, and the like.

The SPECIAL ORDINARY *census regalis* in its original was annexed to the crown for the support of the kingly state and dignity; this is of several kinds, viz.

Purveyance, or buying at the king's price; which is since taken away (d).

Prisage, i. e. one tun of wine for every ten tuns laden in every ship; and from aliens, in lieu thereof, two shillings for every tun.

Here add who are exempted from prisage, &c.

Customs, great and small, *magna & antiqua custuma*.

Bona vacantia, as waifs, strays, *wreccum maris*.

Royal fish, as whale and sturgeon.

Bona forisfacta, vel confiscata; as,

Bona felonum, vel felonum de se.

Bona fugitivorum.

Bona utlagatorum, & in exigendis positorum.

Royal escheat: as

Terra Normanorum.

Terra Alienigenorum.

Terra Proditorum.

Royal mines.

Maritime increase, by reason of *illuvio maris*.

Profits of his courts; as,

His fees of the seal.

Fines upon original writs.

2 Inst. p.
576, 577.

Post-fines, or fines *pro licentiâ concordandi*.

Fines for misdemeanors, and those are either common or royal.

Common fines on vills, townships, or hundreds, for the escape of murderers, felons, and the like.

Vide § 1. Amerciaments.

Custody of ideots and lunaticks lands:

The latter upon account, not so the former.

Profits of his forests.

Treasure trove.

SECT. IX.

Of the relative prerogatives of the crown.

THUS far I have gone with the direct or substantive prerogatives of the crown ; now I come to those that are dependant and relative : which are of several kinds, viz.

The prerogatives,

Of his PRESENCE, in relation to breach of the peace, seizure of villeins, arrests, &c.

Of his POSSESSIONS ;—that no man can enter upon him, but is driven to his suit by petition. And here of traverse, *monstrans de droit, amoveas manus*, &c. when, in what cases, and how to be brought.

Of his DEMESNES ; and the exemptions of ancient demesne rights. Vide supra, s. 8.

Of his grants, how to be expounded.

Or his suits ; as,

In what courts, and election of courts.

In what writs.

In his process.

In his pleadings.

In his judgments.

In his executions.

Of his DEBTORS AND ACCOUNTANTS, in their debts and accounts.

In relation to his TREASURE, and of his officers employed therein.

In relation to persons RELATED to him; as, his queen consort; and here of her separate capacity, her revenue, *aurum reginæ*.

His children; his eldest son, eldest daughter, &c.

His ministers attending his person, or his courts, or his public service.

And herein,

Of privilege.

Of protection.

And thus I have gone through the analysis, or scheme of the king's prerogative; by which, though it be but hastily and imperfectly done, may be seen, of what vast dimension this one, though GREAT title of the law is, and what a vast number of great and considerable titles fall into it; insomuch that if I should pursue any one of these subordinate titles, though it might seem but narrow, and here expressed but by a word or two, as wreck, waif, toll, custom, &c. there is not one of these, but in the bare analysis of it, and of the several incidents and rivulets that would be found to fall into it, would grow as large as the brief abstract of this great head has done, and it may be much larger: as the capillary veins and arteries in the body take up more room and extension, than the great trunks, out of which their small ramifications are drawn.

SECT. X.

Of the SUBORDINATE magistrates: and first of ecclesiastical.

THUS far of the supreme magistrate; and of the rights annexed to him by reason of his office. The next consideration is of SUBORDINATE magistrates, which shall consider in the same method as the former, viz. not only in their own persons, but also in those rights they have annexed to them by reason of their offices or magistracy.

All subordinate magistracy is derived from the supreme, either immediately or mediately; either by express grant from him, or by something that implies or supposes it in its original; viz. custom or prescription. And this magistracy may be distinguished into these kinds, viz.

Magistrates ecclesiastical.

Magistrates temporal.

Ecclesiastical magistrates; such, namely, as have a jurisdiction annexed, are of two kinds;

Ordinary.

Extraordinary.

The ordinary ecclesiastical magistrates are also of two kinds, viz.

Such as have ecclesiastical jurisdiction annexed to their places and offices PRIMARILY and originally; as archbishops, bishops, archdeacons.

Such as have their jurisdiction by substitution and delegation from THEM, as chancellors, officials, surrogates, vicars general, guardians of the spiritualties, &c.

The extraordinary ecclesiastical magistrates, are certain persons appointed by the king's commission for hearing and determining matters of ecclesiastical conusance, the king being supreme head in matters ecclesiastical. And this is either,

In the first instance; such as were anciently commissioners in matters ecclesiastical, either *ad universalitatem causarum*, or in particular cases.

In the second instance, as commissions of appeal, and of review.

And because those magistrates have ecclesiastical jurisdiction annexed, here might be brought in the whole particulars thereof, and amongst them principally these, viz.

In matters of crime, as adultery, fornication, incest, &c.

In matters of interest, as,

De testamentis & administrationem commissione.

Here of that matter.

De matrimonia & divortio : and here, who may marry ; what is a lawful marriage ; the kinds of divorces, and their consequences or effects ;

In dissolving, or not.

In bastardizing, or not.

In cases of general bastardy, when written to by the TEMPORAL courts.

In cases of tithes.

In cases of dilapidations.

In cases of ability of clerks, institution, destitution, or deprivation, suspension, sequestration, &c. of ecclesiastical benefices.

Of the difference between jurisdiction VOLUNTARY, as admissions, institutions, probate of wills, commission of administrations, and CONTENTIOUS jurisdiction.

Of their sentences and coercion, namely, excommunication, and the effects thereof, in reference to,

Disabling the party.

Imprisoning the party.

The method of RESTRAINING the exceeding of their jurisdiction ;

By prohibitions.

By *præmunire*.

The means of redressing their errors,

By appeal : the method and effects thereof.

Of the several courts belonging to their several jurisdictions ; as,

To archbishops, their court of audience, prerogative court, and court of arches.

To bishops, their several consistories, and chanceries, their chancellors, &c.

Their power of visitation. To what it extends:

To corporations { Spiritual.
Lay.

When to hospitals.

When to universities, &c.

SECT. XI.

Concerning TEMPORAL magistrates.

THE temporal magistrates are of three kinds, viz.

Military.

Maritime.

Civil, or common-law magistrates.

The military were the constable and marshal, whose power, as far as the common law takes notice of it, consisted of two parts, viz.

Of a kind of MIXTUM IMPERIUM, which principally was for the preservation of peace, and ordering the army in time of war.

A jurisdiction belonging to their court martial: whereof before.

The maritime is the admiral, and those deriving power under him.

Their power likewise consists of,

A kind of MIXTUM ET SUBORDINATUM IMPERIUM over the officers and seamen, especially in the king's fleets and yards.

POTESTATEM JURISDICTIONIS, in relation to matters arising upon the high sea.

And here of the admiral's jurisdiction, and the remedy if he exceeds in it;

By prohibition.

Action on the stat. 2 H. 4.

The common law, or civil magistrate; I mean such as are instituted either by the common law, by statute, or by custom: these, in relation to things temporal, are various.

And because these magistrates consist not only of natural persons, as they are such, but of natural persons constituted in some degree of empire, power, or jurisdiction ; here will aptly fall in the diversity, the jurisdiction and powers of the several courts, and of the officers, both ministerial and judicial. These, though I shall not prosecute in all their branches and extents, yet I shall give some short account of them, viz.

The subordinate CIVIL magistrates are of two kinds :

Such as have not only a civil power, which I may call POTESTATEM MIXTI IMPERII, but also have a power of jurisdiction.

Such as have a kind of civil power, or MIXTUM IMPERIUM, but without jurisdiction. Vide sect. 12.

As to the former,

The persons that exercise this power, or jurisdiction, are called JUDGES, or judicial officers.

The places, or tribunals, wherein they exercise their power, are called COURTS.

And the right by which they exercise that power is called JURISDICTION.

This therefore yields us these considerations.

The courts themselves, what they are, how they are constituted.

What their jurisdiction is, and the extent thereof.

Who the judges are, and how made, whether by commission, charter, prescription, custom, or by course of the common law.

The courts are of two kinds :

Courts of record.

Not of record.

First, of courts of record, there is this diversity, viz.

Supreme.

Superior.

Inferior.

The supreme court of this kingdom is the HIGH COURT OF PARLIAMENT, consisting of the king, and both houses of parliament.

The courts I call SUPERIOR, are indeed of several ranks and degrees, and every one nevertheless is to keep within the

bounds and confines of its jurisdiction by law assigned. And they are,

More principal.

Less principal.

The more principal are,

The court of the lords house in parliament,

The great courts at Westminster ; as,	{	Chancery,
		King's Bench,
		Common Pleas,
		Exchequer.
Justices itinerant (e)	{	<i>Ad communia placita.</i>
		<i>Ad placita forestæ.</i>

The LESS principal are such as are held,

By commission :	{	Gaol-delivery,
		Oyer and terminer,
		Assize,
		<i>Nisi prius,</i>
		And divers others.

By custom, or charter :	{	As the courts of the counties palatine of	{	Lancaster,
				Chester,
				Durham.

By virtue of act of parlia- ment, and the king's com- mission : as the courts of	{	Grand Sessions,
		Sewers,
		Justices of Peace,
		And divers others.

INFERIOR courts of record. Though there be a subordination of most courts to some other, yet for distinction's sake I shall call those inferior courts which are ordinarily so called ; as,

Corporation courts.

Courts leet.

Sheriffs torns.

Secondly, courts NOT of record are divers : as,	{	Courts baron,
		County courts,
		Hundred courts,
		And others.

But I am not solicitous of pursuing this matter of courts and their jurisdiction over-largely ; because all the learning of them is already put together in the Tractates of Crompton, lord Coke, and others, who have written on the jurisdiction of courts.

(e) See Blac. Com. 3 v. 57. 4 v. 411. 422.

SECT. XII.

Of inferior magistrates, SINE JURISDICTIONE.

It now follows, that somewhat be said of those magistrates who have a certain IMPERIUM, but without jurisdiction; and these are called ministerial officers.

Some officers indeed are simply MINISTERIAL, as clerks and officers in courts, *custos brevium*, prothonotaries, the remembrancers and chamberlains of the exchequer, &c.

But these, though they have a superintendency over their subordinate ministers, and a ministerial administration in courts of justice and elsewhere, I shall not meddle with in this place, but refer them to the several courts to which they belong.

For those that I here intend are of a more public and common kind, and are principally these, viz.

The sheriff of the county, who is THE GREATEST MINISTERIAL OFFICER; and I call him a magistrate, because he is A CONSERVATOR OF THE PEACE of the county, and executes the process of the king's courts.

Here are considerable,

How constituted:

How discharged:

What his power, his office, his duty.

This is a large subject: see those that have written of this office.

Mayors of corporations. And here of heads and governors of colleges, &c. (f).

Constables, and head constables.

These, though they have not any jurisdiction to hold continuance of any fact, yet are conservators of the peace, and have a kind of MIXTUM IMPERIUM relative to it.

Bailiffs of liberties, serjeants of the mace, and all that have a power vested in them by law for the EXECUTION of justice,

(f) As to JUSTICES OF THE PEACE, see Blac. Com. 1 v. 350 to 355.

are within the precincts and extents of their several offices A KIND of magistrates ; for a subjection is by law required of others to them, in relation to that power wherewith they are invested, and the execution thereof.

Thus far of magistrates both supreme and subordinate, and the several rights that are INTUITU & SUB RATIONE OFFICII annexed to them.

SECT. XIII.

Of the rights of the people or subject.

HAVING gone through the distribution of magistrates, I come now to the other term of relation, namely, of SUBJECTS.

And the RIGHTS of subjects are of these two kinds, viz.

Rights of DUTY, to be performed.

Rights of PRIVILEGE, to be enjoyed.

As to the first of these, they are such duties as are to be paid or performed by them ; either,

To the king, as supreme executive magistrate : or,

To inferior or subordinate magistrates.

The rights or duties to be performed by the people to the king himself, are,

Reverence and honour, fidelity and subjection.

All which come under the name of ALLEGIANCE ; and the extent of this is declare , and assurance thereof given, by the oaths of allegiance, &c. of supremacy by 1 Eliz. of obedience by 3 Jac. 1. .

Payments of those rights and dues, customs, subsidies, &c. which either by the common law or by act of parliament are settled on the king.

The rights to be performed to INFERIOR magistrates, are,
Reverence and respect to them, according to their place and authority.

A just subjection to their **LAWFUL** power and authority, as far as by law it extends.

The rights and liberties to be enjoyed **BY THE PEOPLE**, both in relation to the king, and all his subordinate magistrates, are, That they be **PROTECTED** by them, and treated according to the laws of the kingdom, in relation to,

Their lives.

Their liberties.

Their estates.

And here falls in all the learning upon the stat. of *magna charta*, and *charta de foresta*, which concerns **THE LIBERTY OF THE SUBJECT**; especially *magna charta*, cap. 29. and those other statutes that relate to the imprisonment of the subject without due process of law; as the learning of *habeas corpus*, and the returns thereupon;

Where the party is to be bailed.

Where to be remanded.

Where to be discharged.

Hither also refer those laws that relate to taxes and impositions; as,

The stat. *de tallagio non concedendo*.

2 Inst. 59.

The petition of right, &c.

3 Car. 1.

Also, the statutes and laws concerning monopolies.

Commissions of martial law.

Commitments by the lords of the council.

And concerning the trial of men's lives, liberties, or estates, otherwise than according to the known laws of the land.

These, and many more of this nature, are common heads of those liberties and rights that the people are to enjoy under the magistrate.

And thus far concerning the **CAPITA LEGIS**, in reference to the political relation of the magistrate, both supreme and subordinate of the one part, and the **SUBDITI** or subject on the other part: for though subject, in a more strict and peculiar sense, is **THE CORRELATIVE OF THE PRINCE**; yet, in a more large and comprehensive right, it is a correlative to any inferior magistrate also, according to a more limited and restrained subjection.

SECT. XIV.

Of the rights of persons under relations œconomical: and first, of husband and wife.

THUS far of the rights of persons under a political relation: now concerning the rights of persons under a relation **ÆCONOMICAL**.

And they are these;

Husband and wife.

Parent and child.

Master and servant.

And I shall here note once for all, that in œconomical relations, as in the former, I shall not only take in the persons themselves, but also those **JURA RERUM** which concern them under that relation; which though they may be of a distinct consideration under *jura rerum*, yet in this, and what follows, I shall, as before I have done, take in those *jura rerum* that have a kind of connection with the **JURA PERSONARUM**, under their several relations.

In the consideration of this relation of husband and wife, are these things considerable, viz.

In relation to the persons themselves.

In relation to certain connexes, consequences, or incidents, belonging to persons under this relation.

As to the former, these **CAPITA LEGIS** and legal enquiries fall in, viz.

The persons that by law may intermarry, the limits whereof are prescribed by the statute 31 H. 8. restraining it to the degrees prohibited by the Levitical law.

And yet a marriage within those degrees is **NOT** void, but void-
ABLE by sentence of divorce.

The age of consent to the marriage:

In the male, fourteen.

In the female, twelve.

Note, the effects of marriages **INFRA ANNOS NUBILES** (g).

(g) As to **CLANDESTINE** marriages, see 26 Geo. II. c. 33. and Blac. Com. 1 v. 439. 4 v. 162.—As to the marriage of lunatics, see 15 Geo. II. c. 30. And as to the marriages of the royal family, see Fortesc. Al. 401, 402. Lords' Journ. 28 Feb. 1772. and 12 Geo. III. c. 11.

The differences of marriages ; as,

A marriage *de facto*.

What is requisite to the constitution thereof ;

And what effect it has.

And a marriage *de jure*,

What it is, and the effects :

And how each may be tried.

What dissolves the marriage.

And here of divorces, viz.

A *mensa & thoro* only ; as,

Causâ adulterii.

Causâ sævitæ.

A *vinculi matrimonii* ; as,

Causâ consanguinitatis vel affinitatis.

Causâ præcontractûs.

Causâ frigiditatis.

And here the effects of such divorce,

In relation { to the parties themselves.
 { to their children.

The second thing is, in relation to those incidents and consequences that arise upon the intermarriage, viz.

^{1 Rol. Abridge. 342.} What things the husband acquires by the intermarriage, viz.

Personal things in possession.

Real chattels to dispose.

And here,

What shall be a possession.

What a disposition.

What things he acquires by the death of his wife ;

In relation to chattels real :

By surviving her. Vide sect. 33.

In relation to inheritances ; as,

Tenant by the curtesy, if he have issue inheritable by her.

^{Bacon's Hist. 105.} Here of tenants by curtesy.

What things he acquires NOT by the intermarriage, or death.

Note, personal things in action, are in him to discharge by the marriage ; but not to enjoy them by marriage ; or death, unless he be her executor or administrator.

Co. on Lit.
235. a.

What acts of the husband during the marriage bind the wife.

And here of discontinuances.

What acts of the wife during coverture bind the husband, and what not.

And here of

Her contracts,

Her wills,

Her receipts.

What acts bind herself, and what not.

And here of fines by judgment against her.

What the wife acquires by the marriage or death of the husband ;

In relation to honorary titles and precedence.

In relation to inheritances.

And here of dower, the kinds of it,

When and how due.

Also of quarantine.

In relation to chattels.

Here *de rationabili parte bonorum* ;

And *bona paraphernalia*.

Remedies by the wife against the husband,

In casu sævitia.

In casu alimonia.

Either in the spiritual court:

Or temporal.

In what actions they must sever.

In what they may join or sever.

What relation of proximity either has to the other in case of survivorship, as to the administration of each other's goods.

SECT. XVI.

Of the relation of master and servant.

TOUCHING the third œconomical relation, of master and servant, little is to be said.

But here consider,

The kinds of servants.

The nature of retainers.

The acts that may be done RECIPROCALLY by the master, or servant, to each other ;

In maintaining their suits ;

In defending their persons.

SECT. XVII.

Concerning relations civil.

I HAVE done with relations political, and also œconomical, and therefore come now to those which I call CIVIL ; though it is true, that term, in a general acceptation, is also applicable to the two former relations.

But in a LIMITED and LEGAL sense, I distinguish civil relations into four kinds, viz.

Ancestor and heir.

Lord and tenant.

Guardian and pupil.

Lord and villein.

SECT. XIX.

Concerning lord and tenant.

UNDER the relation between lord and tenant, these titles fall, viz.

First, the tenure itself :

What it is ;

How created :

What the fruits thereof ;

Inf. Sect. 24. Rent, { Service.
Charge.
Seck.

Services of two kinds :

Of common right incident to tenures ; as,

Fealty :

What it is.

Conventional services ; as,

Homage,

Knights service,

Grand or petit serjeanty.

Secondly, certain perquisites arising from it ; as,

Wardship ;

Marriage ;

Escuage ;

Relief :

And also escheat, which is either,

Postea, Sect. 33. EX DEFECTU SANGUINIS, for want of heirs : or

EX DELICTO TENENTIS, as by attainder.

And these several titles may be branched into exceeding many particulars.

SECT. XXI.

Of lord and villein.

THIS title is at this day of LITTLE use, and in effect is altogether antiquated ; and therefore I refer myself herein wholly to Littleton.

SECT. XXII.

Concerning persons or bodies politic, i. e. CORPORATIONS.

I HAVE done with the JURA PERSONARUM NATURALIUM, considered under their several relations, political, oeconomic, and civil ; and therefore I now come to persons politic, or corporations, that is, bodies created by OPERATION OF LAW.

The highest and noblest body politic, is THE KING ; who though he be a body natural, yet to many purposes is also a body politic or corporate, as has been already shewn, and shall not now resume. Therefore bodies corporate, in respect of the nature of them, I divide into two kinds, viz.

Ecclesiastical.

Temporal.

Ecclesiastical corporations are distinguished in their constitution, thus ; viz.

In the title of it.

In the manner of it.

In the nature of it.

In the TITLE of their constitution, they are,

By prescription ;

By charter ; as all NEW ecclesiastical corporations, founded WITHIN memory, are.

In the MANNER of their constitution, they are,

Elective.

Presentative.

Donative.

And here,

Of institution.

Induction.

By whom to be made ;

And when ;

And the effects thereof.

Also of lapse,

And devolution ;

When, and how.

In the NATURE of their constitution, they undergo many diversifications, and are,

With cure, as parson, vicar, &c.

Without cure, as prebend.

Regular, as abbot, prior.

Secular, as master of hospital, parson, vicar, &c.

With dignity, as bishops, deans, chancellors ; or,

Without dignity, or simple benefices, as parson, vicar, prebend.

Sole, as bishop, dean, parson, vicar, prebend ; or,

Aggregate, as dean and chapter, master and confraternity.

And under every of these distinctions, the following connexes fall in, and are considerable. viz.

How they may ACQUIRE :

And what is requisite thereto.

By charter or deed.

By licence to purchase in mortmain.

And here of MORTMAIN, which is equally applicable to all sorts of corporations, whether ecclesiastical or secular.

How they may ALIEN.

Here fall in the several disabling statutes of 1st, 13th, and 18th of Eliz. and the enabling statute 32 H. 8. &c. and what circumstances and qualifications are requisite to enable such alienations : and if by demise, or otherwise.

How they are DISSOLVED ; and the effect of such dissolutions ; as,

What becomes of

 Their lands ;

 Their goods.

And this is likewise applicable to

 Lay corporations.

Now as to temporal or lay corporations,

 They are of two kinds :

SPECIAL corporations, i. e. erected to some special purposes, as where the grant is to a monk, or to the good men of Islington in fee-farm.

 So **CHURCH-WARDENS** are, by the common law, a special corporation to take goods or personal things to the use of the parish.

GENERAL corporations ; which are distinguished thus :

 In respect to the **TITLE** of their corporation,

 By charter :

 By prescription.

 In respect of their **QUALITY** or condition, they are either,

SOLE ; as the chamberlain of London, as to bonds taken by him for the use of orphans, is a sole corporation.

AGGREGATE, as mayor and commonalty,, master and scholar, master and confreres of an hospital, &c.

 And here,

 The manner of their visitation :

 And by whom.

 In respect of the **RULES** of their constitution, where the members are,

 Elective.

 Donative.

And as common incidents to corporations are considerable,

How they are dissolvable.

 By **QUO WARRANTO**.

The effect of such dissolution.

How the particular members are removeable,

Their remedy, if wrongfully removed,

 By **MANDAMUS**.

And here comes in the learning of writs of restitution in the king's bench, of persons unduly disfranchised.

I shall consider the wrongs, injuries, or causes of action, arising by wrongs or injuries DONE to those rights.

I shall consider the several REMEDIES that relate either to the retaining or recovering of those rights.

First, therefore, I proceed to the consideration of the things themselves and their distributions. Bracton (and others) following the civil law, in his second book, cap. 11. DE RERUM DIVISIONE, makes many distributions of things; but I shall only use such a distribution, as may be comprehensive enough to take in the general kinds of things, whereof the law of England takes notice; without confining myself to the distributions of others, but where I find it necessary for my purpose.

Things therefore in general may be thus distributed, viz.

Some things are temporal or lay.

Some things are ecclesiastical or spiritual.

Those things that are temporal or lay are of two kinds;

Some are JURIS PUBLICI.

Some are JURIS PRIVATI.

Those things that are JURIS PUBLICI, are such as, at least in their own use, are COMMON TO ALL the king's subjects; and are of these kinds, viz.

Common highways.

Common bridges.

Common rivers.

Common ports, or places for arrival of ships.

And this lets in the various learning touching those things. As for instance:

Who are to repair highways or bridges.

By tenure.

By custom, or of common right.

Also concerning nuisances in them.

And in common rivers or ports.

And how to be remedied.

[But this we shall meet with when we come to pleas of the Crown.]

Those things that are JURIS PRIVATI, are of two kinds:

Things personal.

Things real.

Things personal are again of two kinds:

Things in POSSESSION.

kinds, according to their several qualifications, and accordingly are demandable IN WRITS; as,

A messuage, a cottage, a mill, a toft, a garden, an orchard, arable land, meadow, pasture, wood, marsh, moor, furze and heath, and divers other appellations.

And here the learning comes in touching the NAMES of things, by which they either,

PASS in assurances; or,

Are DEMANDABLE by writs, &c.

Things corporeal aggregate, are such as consist of things of SEVERAL NATURES, whether they be all corporeal, or the principal part corporeal, but the other part INCORPOREAL; because that part which is corporeal in them, gives it the denomination of corporeal; and they pass WITHOUT deed for the most part, as things corporeal do, and are of several kinds, viz.

Honours, consisting of many manors.

Manors, consisting of,

Things corporeal, as demesnes;

Things incorporeal, as reversions, services.

And here of manors, how created:

And the incidents to them; as,

Court-baron.

Also of the distribution of them into,

Manors IN RIGHT, where there are demesnes and freeholders.

Manors IN REPUTATION; as conventional or customary manors, consisting of copyholders only.

Rectories, consisting of glebe and tithes.

And although rectories PRESENTATIVE may seem more properly to come under things ecclesiastical; yet since at this day many rectories and tithes are also become LAY fees, I bring them in under this distribution.

Vills, hamlets, granges, farms, &c. are a kind of corporeal things aggregate; for they consist of houses, lands, meadows, pastures, woods, &c.

And here comes in,

Parcel, or nient parcel.

What parcel in right.

What parcel in reputation.

And the effects thereof in point of conveyance.

Prædial ;

And mix'd.

And here again of tithes, their kinds, their discharges, &c. may be referred hither, and that more properly than before.

COMMONS of all sorts ; as commons of estovers, and of pasture, appendant and appurtenant ; for cattle *sans* number *superabilis pastura* ; and what may be done by those commoners.

In relation to OTHER commoners by ADMEASUREMENT.

In relation to the lord by distress or action.

And all the learning hereof may be added here, though we shall meet with it again hereafter.

All kinds of PROFICUA CAPIENDO IN ALIENO SOLO ; as herbage, pawnage, &c.

All kinds of pensions, proxies, (procurations) &c.

OFFICES of all sorts.

And here of offices, their distribution, what may be incident or appurtenant to them.

FRANCHISES and LIBERTIES of all sorts, many of which have been before mentioned, and may be transferred hither.

And here I shall again shortly distribute them into these two kinds, viz.

Vide § 8. Such as are flowers of the crown and part of the king's royal revenue, as waifs, strays, felons, goods, goods of persons outlawed, prisage, wreck, treasure trove, royal fish, royal forfeitures, fines, issues, amerciaments, forests, &c.

Such as are NOT parcel of the king's royal revenue, but either lodged in him, or created by him ; as counties palatine, markets, fairs, tolls, courts leet, hundred courts, liberty to hold pleas, returns of writs, bailiwicks of liberties, warrens, ferries, and the like.

And every one of these yield a large field of learning, viz. How they may be created or acquired.

What are acquired by prescription or custom.

What in point of charter.

Where one liberty may be granted to the prejudice of another, or not.

How these several liberties are to be USED : what their nature, &c.

How they may be lost, either by nonuser, misuser, or non-claim in eyre.

And therefore, though I have mentioned these liberties and franchises before, in relation to the king's VOLUNTARY JURISDICTION in creating them, yet the full discussion and learning of every of them may be hither referred.

VILLEINS ; and here that learning may come in. Vide ante, Sect. 21.

DIGNITIES ; as dukes, marquesses, earls, viscounts, barons, &c.

And thus far touching incorporeal real things TEMPORAL.

Their common incident is, that they pass NOT from one to another WITHOUT deed. And to these several titles, may be reduced all the learning of each particular.

SECT. XXV.

Concerning things ecclesiastical or spiritual.

I HAVE done with things temporal, and come to those that are ECCLESIASTICAL or spiritual. And though the possessions of ecclesiastical persons, the offices, courts, and jurisdictions ecclesiastical, and tithes also, might come in under this general head, yet because these things fall in the former title under temporal things, and for that the rule for them both is the same, I shall not need to repeat it here ; only I will remove what before came under the title Corporations, because it may be thought to come in more conveniently in this place.

Ecclesiastical things are of two kinds, viz.

Such as are ecclesiastical or spiritual in their USE.

Such as are so in their NATURE.

Of the former sort, are,

Churches,

Chapels,

Churchyards, &c.

(Which lets in the learning touching repairs.)

And these are of two kinds.

Parochial.

The bounds of parishes.

Relief of the poor.

And other parochial charges.

And these are either,

In right.

In representation.

Not parochial; as,

Chapels of EASE.

Such as are ecclesiastical in their NATURE, are either,

Dignities, or,

Benefices.

Ecclesiastical DIGNITIES are of two kinds, viz.

SUPERIOR; as,

Archbishopricks,

Bishopricks.

INFERIOR; as dignities in cathedral churches, as,

Dean,

Chancellor,

Præcentor.

Ecclesiastical benefices are likewise of two kinds :

WITH CURE; as,

Parsonages,

Vicarages, &c.

WITHOUT CURE; as,

Prebends,

Ecclesiastical hospitals, &c.

And here the learning touching those matters, and also touching vacancy by pluralities.

Also of appropriations, common dispensations, qualifications :

Touching property in possession, it is either,

Simple or absolute ;

Special or particular.

Simple or absolute property, is when a man HAS IT, and no other has or can have it from him, or WITH him, but by his own act or default.

The special or PARTICULAR property is of two kinds, viz.

Such as some OTHER has a CONCURRING interest with him therein.

Such wherein, though no other has any concurring interest with him, yet his property is but TEMPORARY, and vanishes by certain accidents or occurrences.

The former kind of those special or particular properties are very various, viz.

The interest that a man has by BAILMENT.

The interest he has in goods PLEDGED : or,

The interest he has in goods CONDITIONALLY granted.

The interest he has in things DISTRAINED, or, a distress.

The interest of goods demised for a TERM.

The second kind of special property, wherein though NO OTHER has a property, nor indeed are things in themselves capable of any CERTAIN or SURE property, yet a man by certain contingents or accidents may have a TEMPORARY property in them ; such are things FERRE NATURÆ ; wherein a temporary property may be lodged upon these grounds, viz.

RATIONE IMPOTENTIÆ ; as in YOUNG birds in a nest upon MY tree.

RATIONE LOCI ; as conies and hares while in MY ground.

RATIONE PRIVILEGII ; as of birds or beasts of warren while within MY warren, and swans within MY liberty.

Touching mixed properties, i. e. partly in action, and partly in possession : They are ANNUITIES ; wherein a man may have a personal inheritance.

Thus far of property or right in things personal.

The second thing propounded is, THE CAPACITY wherein a man may have them ; and that is double ;

IN JURE PROPRIO.

IN JURE ALTERIUS.

And this latter is of two kinds ;

As a body politic.

As executor in right of the testator.

The third thing propounded is, the MANNER of the acquest, or translation of property. And because both of these will be much of one consideration, I shall join them in the course of my distributions.

Personal things, either in action or possession, may be acquired or transferred three ways :

By act in law.

By act of the party.

By a mixed act, consisting of both.

SECT. XXVII.

Of acquisition of property by act IN LAW.

THIS acquisition by act IN LAW may be many ways, viz.

By SUCCESSION, whereby properties are transferred to the successors of such a corporation by law or custom, which has a power to receive personal things in a politic capacity ; as,

A sole corporation by CUSTOM :

An aggregate corporation, by COMMON LAW.

By DEVOLUTION, viz.

To the executor.

To the ordinary.

To the administrator.

To the husband by the intermarriage, i. e. as to personal things IN POSSESSION, but NOT as to personal things IN ACTION.

By PREROGATIVE ; whereby they are given to the king, or to such as have the king's title, by grant or prescription ; as waif, stray, wreck, treasure trove.

By CUSTOM ; as in the case of heriot custom, and heriot service, mortuaries, heir looms, foreign attachment, assignment of bills of exchange.

By JUDGMENT, and EXECUTION thereupon ; which in the case of the king extends as well to things in action that have a certainty in them (as debts) as to things in possession. But in the case of a common person, ONLY as to things in possession.

And this by,

FIBRI FACIAS : or,

Devant 16. ELEGIT.

By SALE in market-overt.

SECT. XXVIII.

Acquisition of property by act of the party, and mixed act.

ACQUISITION of property BY ACT OF THE PARTY, may be three ways, viz.

By grant.

By contract.

By assignment.

And herein is considerable,

That in THE KING's case it extends as well to things in action as in possession ; for DEBTS may be assigned TO HIM, or BY HIM.

In the case of other persons, only things in POSSESSION are assignable.

Acquisition thereof by a mixed act, partly by act of law, and partly of the party.

And thus things in action, as well as in possession, are transferrable two ways.

By act of the party, with CUSTOM CO-OPERATING.

Thus a bill of exchange is assignable.

SECT. XXX.

Of estates in fee-simple and fee-tail.

OF an estate in fee-simple ; wherein is considerable,

The extent and nature of the estate ;

The quality incident thereunto.

As to the extent and nature of the estate :

It is an estate TO A MAN AND HIS HEIRS FOR EVER.

And a fee-simple is either,

Co. Lit. Absolute;

18.

Limited or qualified.

An absolute fee-simple is such as has no bounds or limits annexed to it, and is an estate to a man and his heirs ABSOLUTELY for ever.

A limited or qualified fee-simple is such as has some collateral matter annexed to it, whereby it is made by some means determinable ; viz.

By limitation ; or,

By condition.

The QUALITY of an estate in fee-simple is, that it is transmissible in the very nature of the estate ;

To the SUCCESSOR in bodies corporate by a right of succession.

To the HEIR in the case of persons NATURAL by descent.

To any other person by ALIENATION.

As to the former of these,

The nature of the corporation directs the rule of succession.

As to the second ;

The rules of descents are directed,

By custom.

By common law.

By custom ; as,

To ALL the SONS in GAVELKIND.

To the YOUNGEST in BOROUGH ENGLISH.

Inf. Sect.
33.

Bacon's
Hist. part
1. p. 106.

A lease for three lives, &c. and accustomable rent, by
stat. 32 H. 8.

Attainder of treason, by stat. 33 H. 8.

Co. Lit. 374. A warranty collateral, lineal, with assets.

What alienations bind both the issue and the reversion, viz.

Co. Lit. A COMMON RECOVERY pursuant to law.

372. b. And here of common recoveries ;

Their kinds :

Their effects.

SECT. XXXI.

Of estates at common law, LESS than inheritance.

THE said estates are considerable likewise :

In their nature and kinds :

In their incidents.

In their nature and kinds, they are either,

Estates of freehold.

Estates LESS than freehold.

Estates of FREEHOLD are again divided into,

Such as arise by act of law ;

Such as arise by act of the party.

Freehold estates arising by act of law are,

Tenant by the curtesy of England.

Tenant in dower.

Sect. 14.

And here of the learning of both these.

Freehold estates arising by act of the party are,

Tenant for his OWN LIFE : which is either,

Simply so ; or,

With a privilege annexed ; as,

Tenant after possibility, *de quo sup.*

Tenant PUR AUTER VIE.

And herein of occupancy,

General.

Special.

As also of estates limited to one and his heirs, *PUR AUTER VIE*.

Estates *LESS* than freehold are of two kinds :

Certain.

Incertain.

Estates less than freehold *CERTAIN*, are leases for years.

And here also of leases by stat. merchant, stat. staple, and *elegit*.

And likewise the learning of extents, re-extents, *audita querela*, &c.

INCERTAIN estates less than freehold are,

Tenants *AT WILL* (i).

These are determinable at the will of either party.

The incidents to all these particular estates, *EXCEPT TENANCY AT WILL*, are these, viz.

They are transferrable from one to another, unless particularly *RESTRAINED*,

By condition ; or

By limitation.

They are forfeitable.

And here of the various forfeitures of particular estates ; as,

Such as give a right or title of entry to him in reversion.

Such as give a remedy by action, as, waste.

Inf. Sect. 42. And here of the title waste.

(i) But see *Blac. Com. 2 v. oct. 145 to 150.*

SECT. XXXII.

Of the distinction of RIGHTS of estates, with relation to the POSSESSION.

HAVING gone through the several kinds and natures of *Vide* § 29. estates both at common law and by custom, I come now in the second place to the various relations that these estates have TO THE POSSESSION; which give several other determinations unto the rights that persons have to them.

These estates before mentioned, and the rights thereupon, are either,

Such as are IN possession;

Such as are NOT in possession.

The right of estates IN possession, is where there does not interpose any estate or interest between the right and the possession of the thing; as,

Tenant for life IN POSSESSION;

Tenant in fee IN POSSESSION, &c.

The rights that are NOT immediately in possession, are, either,
Where the time of their enjoyment EXPECTS the accomplishment of something else, that MUST ANTICIPATE it.

Where the RIGHT or estate perchance is immediately IN the party; but the possession thereof is removed or detained by another.

As to the former of these, they are of several kinds, viz.

REVERSIONS; which though a present interest, yet stands in a degree removed from the possession till the particular estate be determined.

REMAINDERS.

FUTURE INTERESTS of terms for years.

CONTINGENT interests; or interests or estates limited to take place upon a precedent condition.

Infants, when bound, &c.

REMEDILESS RIGHTS are where the remedy is taken away,
though THE RIGHT REMAINS;

Which may be either,

By warranty, collateral or lineal, with assets,

Supra,
Sect. 30.

And here comes in the learning of bars and rebut-
ters by warranty.

By nonclaim upon a fine.

By limitation of time. By the old, or the later statutes, in-
troduced in such cases, viz. 32 H. 8. 21 Jac. 1.

The third thing I propounded, was the different quali- Vide § 29.
ties and relations in regard of the persons having the estate.

And these are,

SOLE TENANTS.

JOINTENANTS.

TENANTS IN COMMON.

And here comes in the learning of each of these.

SECT. XXXIII.

*Touching acquisition and translation of estates in things
real. First, BY ACT IN LAW.*

THUS far have I gone in a description of the various natures, rela-
tions, and kinds of estates; and now I come to the manner or
MEANS of their acquist or translation.

And an estate or interest is thus translated, viz.

By act of law;

By means of the party. Vide prox' Sect.

By act of law, there is a various acquisition of things, according
to their several natures, viz,

Of things real that are CHATTELS.

Of things real that are FREEHOLDS.

Of things real that are INHERITANCE.

As to the acqurest of CHATTELS by act of law ; though they are real, they are of the same kinds as things personal, therefore vide ante Sect. 27.

[Only with this additional exception, that chattels real go not to the husband immediately by the marriage, UNLESS HE SURVIVES THE WIFE.]

As to the acqurest of estates of FREEHOLD by act in law, there is only the title Occupancy which here comes in ;

And that is either { General.
Special.

As to matters of INHERITANCE, the titles of acqurests therein by law, seem to be of two kinds, viz.

Such as is applicable to all estates of inheritance, viz. DESCENT.

Such as is applicable only to the acqurest of all estates in FEE-SIMPLE.

The act in law applicable to the acqurest of all estates of inheritance,—descent, or hereditary succession, is either

Of an estate-tail : or,

Of an estate in fee-simple.

Touching the descent of estates-tail, THE MANNER OF THE LIMITATION DIRECTS THE DESCENT as aforesaid.

Touching the descent of fee-simple, two things are considerable, viz.

The rules of the descent itself.

The burden or charges that lie upon the heir that takes by descent.

The rules of descents of fee-simple are directed, either,

By custom ; or,

By common law.

The direction of descents by custom is various ; as,

Sometimes to ALL the sons, as GAVELKIND :

Sometimes to the YOUNGEST son, as BOROUGH ENGLISH.

Sometimes to the eldest daughter, or youngest, &c. as some customary lands.

The direction of descents by the common law, and the rules thereof, are divers, viz.

§ 18.

Relating to the QUALITY of the persons in the line,

ASCENDING,

DESCENDING,

And TRANSVERSAL.

In relation to the number of persons inheriting, viz.

ONE, if it be A MALE, is heir.

ALL, if they are FEMALES.

And here the learning of parceners and partition.

In relation to the IMPEDIMENTS of the descent ; as,

ILLEGITIMATION,

HALF-BLOOD.

ATTAINDER,

Or CORRUPTION OF BLOOD.

The burden upon the heir : how and where chargeable ;

With the debt or covenant of the ancestor :

With the warranty of the ancestor.

The second kind of means of acquisition by act in law, refers only to estates in fee-simple ; as,

First, by prescription or custom ; which is,

Of things IN GROSS and SUBSTANTIVE :

And thus a right of an incorporeal inheritance is gainable.

Of things incident and appurtenant,

And here of prescription or custom ; the nature, kinds, and effects thereof.

Secondly, by ESCHEAT ; which is either,

Ante 16.

For default of heir.

For attainder of the tenant, viz.

For felony,—to the lord,

For treason,—to the king.

SECT. XXXIV.

*Concerning acquests by the means of the party. And first,
by RECORD.*

ACQUESTS of estates, by the means of the party himself, may be of two kinds, viz.

By wrong ;

By right or title.

Acquisitions by wrong are also of two kinds, viz.

By wrong to a chattel ; as,

Ejectment of farm.

Ejectment of *gard*.

By wrong to a freehold ; as,

Abatement ;

Disseisin ;

Intrusion ;

Usurpation.

Acquisition by right or title, is likewise of two kinds ;

By CONVEYANCE :

By FORFEITURE.

Acquisition by conveyance. Here may be brought in all the methods and courses of assurances and conveyances of lands, which lets in the most ample and considerable part of the law.

Conveyances therefore are of two kinds :

By matter OF RECORD.

By matter IN PAIS.

By matter of record, they are either,

By fine.

By common recovery.

By deed enrolled.

By FINE ; where comes in all that learning, viz.

Their kinds ;

Their effects.

Their kinds are in general two, viz.

Fines at Common law.

Fines with proclamations.

And here of their kinds in special.

Their effects ;

In relation to bar privies, or conveyance of estates.

In relation to strangers, non-claim.

As to COMMON RECOVERIES, therein are considerable ;

Their kinds, with treble, double, or single voucher.

Their effects ;

In relation to transferring or barring estates in fee-simple.

In relation to barring estates tail, remainders, reversions,
&c.

As to DEEDS ENROLLED, they are of three kinds, viz.

Deeds enrolled by special custom ; as in London.

Deeds enrolled at common law.

Deeds enrolled in pursuance of the stat. 27 H. 8. or bargain
and sales enrolled :

Whereof hereafter, Sect. 36.

SECT. XXXV.

*Concerning conveyances by matter IN PAIS. And first,
of DEEDS.*

CONVEYANCES by matter *in pais* are of two kinds, viz.

Conveyances without deed.

Conveyances by or with deed.

Conveyances IN PAIS without deed, are either,

Of chattels ; or,

Of freeholds.

Of CHATTELS ; as leases, or extents of land ; and may be
either,

By grant or assignment ;

By parol ;

By exchange ; *quare*.

Of FREEHOLD of lands by livery. Of this hereafter.

Conveyances IN FAIS, with or by deed.

Here we may consider,

The nature of deeds themselves.

Their effect or efficacy in relation to,

Acquiring	} Estates.
Transferring	

Concerning the nature of deeds, they are considerable ;

Simply in themselves :

And here the whole learning of deeds, viz.

Of the parties thereto, and their names.

Of the kinds of deeds, viz. indented and poll.

Of the parts constituting deeds ; sealing and delivery, &c.

With RELATION to the passing of estates ; and so they are called,

Charters,

Grants,

Feoffments.

Deeds SIMPLY considered :

Their constituent parts, SEALING and DELIVERY.

The parties to them ; GRANTOR and GRANTEE, &c. their names, &c.

Their kinds, INDENTED, and POLL : and the EFFECTS resulting from both or either ;

Particularly of estoppel.

Deeds considered with relation to their USE, especially in grants, feoffments, and other conveyances.

And herein we consider,

Their kinds ;

Their several parts.

As to the kinds of deeds, they are either,

Such as have their efficacy without the adjunct of some other ceremony.

Such as to their EFFECTS require another ceremony to be joined with them.

As to the former of these, they are of three kinds :

Grants ;

Releases ;

Confirmations.

As to GRANTS : there are many things that are of an INCORPORATE REAL nature ; as, [advowsons, tithes, liberties, commons, &c.] that,

CANNOT pass from one to another by act of the party without deed. Yet,

Pass by deed without any other ceremony requisite. 2 Co. 23. b.

As to RELEASES, they are of several kinds, viz.

Releases, whereby the thing released is EXTINGUISHED in the possession of the releasee ; as, rights, common, seigniories, rents, &c. and other profits issuing out of lands by release to the tenant.

Releases whereby an estate is transferred, which is either,

By MITTER LE ESTATE, as of one joint-tenant to another.

By INCREASE or ENLARGEMENT of the estate, being made by the reversioner to the lessee in privity, with apt enlarging words.

As to CONFIRMATIONS, they are of two sorts, viz.

CORROBORATING the estate of which it is made ; as, dean and chapter confirming the grant of the bishop ; patron and ordinary confirming the grant of the parson ; or the disseisee that of the disseisor.

ENLARGING the estate with apt words ; as, in case of release.

As to the other sort of deeds that require a ceremony CONCOMITANT with them, to make them effectual, viz.

A LIVERY OF SEISIN in the case of a feoffment, though by deed ;

And here comes in all the learning of livery, letters of attorney to make or receive it, &c.

ATTORNNMENT requisite in cases of grants, of reversions, remainders, rents, seigniories.

And here of attornments ; how, by whom, and when to be made.

And the several effects thereof, viz.

To create a privity of distress, or action ; as in the case of fines, *quid juris clamat, quem redditum reddit, per quæ servitia.*

To pass **THE INTEREST**, as in case of grants, singly by deed.
Thus far of the nature of deeds in reference to the acquist of lands.

But there are besides this, in relation to deeds passing lands, several parts that usually occur in deeds, and which take up large titles, viz.

The **PARTIES**, and therein their names, and names of purchase;
as grantor, grantee, feoffor, feoffee.

The **PREMISES** of the deed ; containing,

FFECTUAL WORDS to pass the interest, as grant, enfeoff,
&c.

The thing granted, which takes in the whole title of comprize, and nient comprize, viz.

By what names things pass :

What things are **COMPRIZED** within the grant, viz.

Things in **GROSS**.

Things **PARCEL**.

Things **INCIDENT, APPENDANT, APPURTENANT,**
&c.

The **HABENDUM** of the deed, **WHICH LIMITS THE ESTATE**;
and what words are apt for this.

The **RESERVATION** or **REDDENDUM** ; and what shall be said
a good reservation.

The **COVENANTS** ; which are of two kinds :

Covenants PERSONAL, and their exposition.

And here of covenants ; as,

What shall pass with the land, and what not ;

Their exposition.

Covenants REAL, which is warranty.

And here of that learning ; as,

What their **KINDS** ;

General,

Special,

Lineal,

Collateral.

What their **EFFECTS** :

By way of **ACTION, VOUCHER, WARRANTIA CHARTÆ**.

By way of **BAR**, or rebutter.

The **CONDITION** or **DEFEASANCE**.

And here all the learning of conditions and limitations : and incident to this learning of deeds falls in those two great titles, viz.

MONSTRANS DE FAITS, or where deeds are necessary to be pleaded or shewn.

EXPOSITION DE FAITS ; which is full of infinite variety, according to the texture of deeds, and their several clauses.

SECT. XXXVI.

Of conveyances by force of statutes.

AND thus far of conveyances according to the course of the common law : and now I proceed to conveyances, according unto, or by force, or power, OF ACTS OF PARLIAMENT.

Conveyances according to, or by virtue of acts of parliament, are of two kinds, viz.

By way of **BARGAIN AND SALE**, according to the stat. 27 H.8.

By way of **USE**.

And this latter is either,

With transmutation of possession ; as,

By feoffment or fine.

Without transmutation of possession ;

By covenant to stand seised.

And this is a large field, for all the learning of **USES** comes in here ; as,

Of **CONSIDERATIONS** sufficient to raise it

CONTINGENT USES, &c.

How destroyed ;

How revived.

By way of devise.

And here all that voluminous title of devises, and the incidents thereto, may be introduced.

SECT. XXXVII.

Concerning CUSTOMARY estates.

THUS far of estates at common law ; we come now to customary estates, viz. tenant by VIRGE, or by copy of court-roll.

And because this is a SPECIAL kind of customary estate, and I shall not have again to do with it, I shall shortly consider these two things, viz.

The nature or kinds of estates grantable thereof.

The incidents relative thereunto.

Touching the nature of estates grantable, THE CUSTOM DIRECTS IT.

For by custom it is grantable,

In fee-simple ;

In fee-tail : and here of the entailing copyholds, where it may be, and how barred.

For life or lives.

Touching the incidents relative to copyholds, they consist either in,

Modes of acquiring : or,

Manner of transferring.

Touching the transferring the interest of the copyholder, it is done,

By hereditary descent : and here of what effect or use the heir's admission is.

By surrender : which is either,

In court. Or,

Out of court, into the hands of the lord, the steward, or customary tenants,—when warranted by the custom.

And the effect of such surrender ; where, when, and how it must be presented.

The learning concerning copyholds is grown very large, and takes in very many particulars : For instance,

Who is lord to make a grant or admittance : what a DOMINUS PRO TEMPORE, or a disseisor, may do therein.

Who is a steward to perform the service, and his power therein.

What shall be said a copyhold manor, or a copyhold court, to enable such grants.

What shall be said a forfeiture of a copyhold estate :

By waste,

By alienation ;

By refusal to perform services.

Who shall be bound by such forfeiture.

Who shall take advantage of it.

What shall be a dispensation with it.

Besides which, there are very many more considerables will fall under the title of customary estates, or copyholds.

SECT. XXXVIII.

Of translation of property BY FORFEITURE.

I NOW come to those translations of estates which happen BY DEFAULT of the tenant in fee-simple, viz. such as are forfeitures of his estate.

And these are of several kinds :

Forfeiture BY ATTAINDER ; either,

Of TREASON—which gives the land to the king by the common law. (And this lets in all the learning touching offices, petitions, &c.) Or,

Of FELONY ; whereby it escheats to the lord ; whereof before, Sect. 33.

Forfeiture by purchase in mortmain WITHOUT LICENCE, whereby it goes to the lord.

Forfeiture by CESSING from doing his services PER BIENNIIUM.

And here comes in the learning of cessions.

Forfeiture by alienation CONTRA FORMAM COLLATIONIS.

SECT. XXXIX.

OF WRONGS OR INJURIES. *And first, of wrongs to persons.*

I COME now from the consideration of rights or JURA, to consider of wrongs or INJURIE; wherein I shall take this order, viz.

First, I shall pursue the several natures of injuries, as they are severally applicable to those things, which are the subjects whereto the several rights aforesaid are adherent.

Secondly, because it will be a shorter and plainer way to mention the several natures of the remedies applicable to the several kinds of injuries, or wrongs, I shall mention THOSE ACTIONS that are applicable to the several injuries, together with the injuries themselves; leaving the farther explication of the manner of application of those remedies unto the third and proper head, concerning RELIEFS or REMEDIES.

As to injuries or wrongs, they are of two kinds, viz.

Such as are of ecclesiastical conuzance.

Such as are of temporal conuzance.

Such as are of ecclesiastical conuzance are either,

Criminal, or,

Civil.

The wrongs CRIMINAL of ecclesiastical conuzance, are such as are PUBLIC scandals and offences, wherein the judge ecclesiastical proceeds, either,

At the prosecution of some person: or,

EX OFFICIO, & PRO SALUTE ANIMÆ; as,

In cases of adultery, fornication, incest, profanation of sacred things or times, (or places,) blasphemy, heresy, and divers others.

Wrongs CIVIL of ecclesiastical conuzance are of these kinds, viz.

DEFAMATION in some particulars.

TITHES,—their right, substruction, &c. As also oblations, mortuaries, pensions.

Causes of SPOLIATION in relation to benefices ecclesiastical.

Matters of MATRIMONY and DIVORCE.

WILLS or testaments, and administrations.

Those wrongs that are of **TEMPORAL** conuzance, are of three kinds :

Such as are of the conuzance of the admiral's court ; as piracy, depredations, and wrongs **ON THE HIGH SEA.**

Such as are of the constable and marshal's court : as usurpation of coats of arms, matters of precedence, &c.

Such as are of the conuzance of the common law courts.

This latter head is very large and extensive ; but, in general, may be divided into two kinds :

Such as are criminal or public, wherein the wrong-doer is proceeded against criminally. And these are to be distributed under the titles of **PLEAS OF THE CROWN.**

Such as are civil or private ; wherein at the suit or prosecution of the party injured, he has reparation or right done.

Touching injuries to **CIVIL** rights or interests, they must be distributed according to the several natures and kinds of those rights which by those wrongs are injured. And since we have already before considered of two sorts of rights, viz. rights of persons, and rights of things, I shall begin with those wrongs that relate to the rights of **PERSONS.**

And since in the distribution we have made of the rights of persons, we have observed, that the rights of persons have a double consideration, viz.

One **ABSOLUTE**, in reference to the person himself; and,

Another **RELATIVE**, with respect to the persons related to him ;

We shall distinguish wrongs accordingly.

Wongs therefore of common law conuzance, which are private or civil, are such as are done either,

By **PARTICULAR** persons ; or,

By countenance of **LEGAL** proceedings.

And the former part of these wrongs, are done either,

To the rights of persons ; or,

To the rights of things annexed to persons, in point of property or estate.

As to wrongs that are done to persons, or in relation to the rights of persons, they are of two kinds ;

Such as relate to the person considered absolutely and IN HIMSELF :

Such as relate to him, as he stands in some kind of RELATION to another person.

As to such wrongs as relate to the person himself, they are of three kinds. Every man has a right to his own person ; and a wrong done to that, is nearest to him, because a man has the greatest propriety in his own person.

And the wrongs thereunto are also of two kinds, viz.

WRONGS TO HIS BODY ;

WRONGS TO HIS NAME OR REPUTATION ; for I reckon this amongst those wrongs that are done to his person.

The wrongs to his BODY are of two kinds, viz.

ASSAULTS ; as beating, maiming, wounding.

Wherein the law gives a double remedy, viz.

PREVENTIONAL ; by security of the peace.

REMEDIAL, by action either of

Trespass,

Assault,

Battery,

Wounding,

Appeal of mayhem.

IMPRISONMENT, without lawful or just cause : 2 Inst. p. 55.

Wherein the law also gives him a double remedy, viz.

To REMOVE or AVOID the imprisonment ; as by *habeas corpus* into the king's bench or common pleas, writs of mainprize, *de odio & atia, de homine replegiando*, &c.

To RECOVER DAMAGES by way of compensation for it, by action of false imprisonment ; or if the imprisonment be lawful, but the party bailable, and his bail REFUSED, in some cases a special action of the case upon the stat. 23 H. 6.

As to wrongs done to his NAME, they are of two kinds, viz.

SCANDAL by words spoken,—libels,—pictures, &c. wherein the remedy is to have compensation in damages by action on the case.

And here comes in all that large title of ACTIONS OF SLANDER, and what words are scandalous.

Under PRETENCE of a legal prosecution, but FALSE and MALICIOUS ; as, for a false and malicious imposing some great crime by complaint to a justice of peace, or by preferring a bill of indictment falsely and maliciously.

The remedy the law gives, is,

Sometimes by an action of conspiracy.

Sometimes, and more ordinarily, by action UPON THE CASE.

SECT. XL.

Of wrongs to persons UNDER RELATION.

THE wrongs that are done to a person under some kind of relation, principally take in the three ÆCONOMICAL relations before mentioned ; as,

Husband and wife.

Parent and child.

Master and servant.

And some of the civil ; as,

Guardian and pupil.

Lord and tenant, &c.

First, for husband and wife ; as where the wife is taken away from the husband, the law has provided a remedy for him by action of trespass DE UXORE ABDUCTA. So if she be beaten, a special action of trespass (on the case) for beating his wife, PER QUOD CONSORTIUM AMISIT.

As to parent and child : wrongs of this kind are either,

By taking away the child under age OUT OF THE CUSTODY of the parent, where the remedy is action of trespass.

By taking away, and marrying the heir within age : the re-

medy is, trespass or ravishment, to recover damages, and the value of the marriage.

As to master and servant :

If a servant be retained by another before his time is expired ;
remedy is, action ON THE CASE.

If a servant be beaten, whereby he is DISABLED to work ;
the remedy is, action of trespass or case, PER QUOD SERVITIUM AMISIT (*k*).

We come now to interests of civil relations, and the wrongs therein respect,

Guardian and pupil.

Lord and tenant.

Lord and villein.

As to the first of these, the guardian has an interest in the pupil in these two kinds of guardians :

Guardian in knights-service.

Guardian in socage (*l*).

If the ward be taken away, or taken away and married, it is a wrong to the guardian, and remediable ;

By trespass ;

By writ of ravishment of ward.

By writ of right of ward.

As to that of lord and tenant : If they be tenants AT WILL, and either by menaces, or by unlawful distresses, they are driven away from their tenancies, it is a wrong which the lord may repair himself in, by special action on the case.

So if a villein be forced from his service, or beaten or maimed so that he is disabled to perform such service, an action of trespass lies, *per quod servitium amisit*. Vide ante sect. 1. 21.

(*k*) Vide the case of Postlethwaite and Parkes, 3 Bur. 1878.

(*l*) But see 16 Car. I. c. 20. and 12 Car. II. c. 24. See also Blac. Com. 1 v. 462. 2 v. 67, 88.

SECT. XLI.

Of wrongs in relation to rights of things. And first, of things personal.

HITHERTO of wrongs as they relate to persons, either absolutely, or under relations oeconomic or civil; I come now to such wrongs as relate to THINGS, and those are either,

To things personal,

To things real.

Wrongs relating to things PERSONAL are of these kinds, viz. according to the nature of the things:

Personal things IN POSSESSION,

Personal things IN ACTION.

As to personal things in possession, viz. goods, cattle, money, &c. the wrongs thereto are of two kinds:

An unjust taking; or a taking and detaining of them, which is an injury; and for which the party grieved has his remedy, viz. either,

To have the things themselves, if detained, by REPLEVIN.

To have reparation in point of damages by action, either of trespass VI & ARMIS; or of trover and conversion.

An unjust DETAINING, without an unjust taking.

The remedy:

The things IN SPECIE,—by replevin, if taken for damages only; or,

Trover and conversion for the THING, or if it can't be had, for damages by DETINUE (m).

(m) There is a mistake in the sentence to which this note is meant to apply. An action of trover does not, as I conceive, lay to recover the THING converted, but to recover DAMAGES for the conversion. On a recovery in trover, the property of the goods is changed, and legally vested in the defendant. STRA. 1078. On the other hand, the immediate object of the action of detinue (unless for a subsequent detainer, where the original caption was legal) is, I apprehend, the POSSESSION of the thing detained; for which reason, in this mode of action, it is necessary to ascertain the thing detained, in so clear and explicit a manner, that it may be specifically known and RECOVERED. F. N. B. 69. 138. But this action is now seldom, if ever, used; the preference, and that for very good reasons, having for some time been given to the action of trover.

And although CHARTERS concerning land be IN THE REALTY in respect of their relation to the land ; yet they are not IN THEMSELVES any more than paper, or parchment, and wax ; and therefore are within the aforesaid rules, in respect of taking or detaining them.

Personal things IN ACTION are likewise of two kinds :

Such things in action as arise by EXPRESS contract or agreement.

Such things in action as arise by IMPLIED contract, or QUASI EX CONTRACTU.

The former kind are of two sorts :

By deed or specialty.

Without deed or specialty.

Those that are with or BY SPECIALEY are also of two kinds, viz.

DEBTS :

And the wrong that relates to them is non-payment according to the deed.

The remedy is action of debt, to recover the debt ITSELF, and damages for non-payment.

COVENANTS ;

The wrong herein is breach of covenant.

The remedy, action of covenant : and here comes in the learning of covenants ;

What words make a covenant.

What covenants pass to the assignees, &c.

Those that are without specialty.

DEBTS :

The wrong and remedy the same as before, in cases of debts by specialty.

And hither also may be referred those things, which though they favour of the REALTY, are yet recoverable by action of debt ; as rents reserved or leases for years, relief, &c.

PROMISES for a good consideration ; whether they be promises that arise by law, or such as are collateral.

Remedy in all such cases, is to recover damages by action ON THE CASE ;

And here comes in WARRANTY of chattels UPON SALE.

Such things in action as arise by an IMPLIED contract are many : for instance ; .

In contracts for things, it is generally intended, THAT NONE SELL ANY THING THAT HE KNOWS NOT TO BE HIS OWN ; if he does, an action on the case lies in nature of DISCEIT.

In contracts FOR VICTUALS, it is implied, THAT THEY ARE NOT UNWHOLESOME ; if they be, an action on the case lies.

In persons that undertake a COMMON TRUST, it is implied, THAT THEY PERFORM IT ; otherwise an action on the case lies.

As for instance ;

In the case of,

A common host, that he secure goods in his inn.

A common carrier or bargeman, that he secure the goods he carries.

A common farrier, that he perform his work WELL, without hurting the horse.

A common taylor, that he does his work WELL ; and so of other tradesmen, &c.

SECT. XLII.

Touching wrongs to things REAL,—without dispossessing the party ;—and their remedies.

I COME now to those wrongs or injuries which are done to things REAL, and the rights of them.

And these may be divided in these two kinds, viz.

Such as are WITHOUT a removing the owner or proprietor out of possession :

Such as are WITH a remover of him out of his possession.

Those which are without a remover out of possession, are of several kinds : I shall reduce them to these following, viz.

TRESPASSES by breaking any man's ground, hedges, &c. by the party trespasser himself, or by his command, or by his cattle, &c.

Remedy, to repair the party in damages, by action of trespass, **QUARE CLAUSUM FREGIT**.

NUSANCES, or annoyances, either

To interests in things corporeal; as houses, &c. by stopping lights, erecting lime-kilns, or things annoying another's dwelling; or withdrawing water from a mill, &c.

Or to things incorporeal; as,

To **CHEMINS** or ways, by obstructing them, &c.

To **MARKETS**, by erecting another market too near them.

So of **FERRIES**, by erecting another too near:

And infinite more instances may be given, the title of nuisances being very large.

The remedies in all these cases are either,

Without suit, **TO ABATE, OR TO REMOVE THEM**,—if done to inheritances corporeal, or *chemins*.

By suit; as,

Quod permittat, assise of nuisance, to remove the thing, and recover damages. Or,

Action on the case to recover damages. Vide Sect. 46 & 47.

DISTURBANCES: and this principally concerns such real things as are incorporeal; for instance;

Disturbance to present to a church presentable: and this concerns advowsons, and right of patronage.

And the remedies relating thereunto are,

Quare impedit;

Assize de darrein presentment;

Quare incumbravit;

Ne admittas;

Breve episcopo ad admittend' clericum :

And this is a vast and a curious piece of learning.

Disturbance of a person to enjoy his **FRANCHISES**; as,

Disturbing such as come to my market, or to my leet.

Forcing them to come to another court.

Not permitting a person to hold his court, or take his toll.

And many more of the like.

The common remedy herein is by action ON THE CASE.

Disturbance of COMMONERS to enjoy their common ; surcharging the common by one that has common ; or by putting in cattle by one that has not common ; by erecting a warren to the prejudice of the commoners.

Here the remedy in some cases may be by admeasure-
ment, assize, *quod permittat* :

But in most, and indeed in all cases of this nature, it is usual by action ON THE CASE.

Disturbances of WAYS.

The like wrongs.

And the like remedy.

The fourth sort of injuries are, SUBTRACTIONS of customs, duties, or services real ; as,

Suit to court ;

Suit to mill ;

Homage ;

Fealty ;

Rents, &c.

The remedies here are are various.

For, first, if the services are accompanied with A TENURE, the ordinary remedy is either,

Without suit,—BY DISTRESS.

And here of distresses, avowries, &c.

With suit ; and then,

If they are rents reserved on leases for years,
the remedy is action of DEBT :

If they are rents of freehold, remedies are by
assize in case of seisin and disseisin.

If those services are WITHOUT TENURE, as suit to mill by custom, &c. the remedies are SECTA AD MOLENDINUM, action on the case.

The fifth sort of injuries is WASTE, or destruction.

And this injury is of two kinds, according to these relations,
viz.

In relation between the owner of the soil, and he that has a profit appendre out of it ; as estovers, pawnage, &c.

If the owner of the soil destroys the wood, the remedy lies by ASSIZE.

Action on the CASE to recover damages.

In relation between the particular tenant and he that has the reversion or remainder of inheritance ; as waste in houses, woods, lands, &c. is a disinherison to the REVERSIONER, who has remedy either,

PREVENTIVE, by estrepement, prohibiting waste ; which also lies against a tenant, where the land is in suit. Or,

REMEDIAL, by action of waste ;

In the TENET ;

In the TENUIT.

And here comes in a great flood of learning :

Supra, What shall be said waste :

Sect. 31.

When, and against whom it lies, &c.

And although under this title of wrongs, WITHOUT REMOVAL OF POSSESSION, I have brought in remedies by assize, &c. which always supposes a dispossession, yet really it is no dispossession in those cases before instanced, because they concern things INCORPOREAL ; wherein, though the party may admit himself disseised, it is but a disseisin AT ELECTION, and rather made a disseisin by his bringing an assize, which the wrong-doer shall not dispute, than truly so.

SECT. XLIII.

Concerning wrongs which carry with them an AMOTION of possession.

THE wrongs which carry with them an amotion of possession are of two kinds, and concern,

The rights of chattels ;

The rights of freeholds.

As to the rights of chattels, whereof the party is disposessed by a wrong-doer, they are these, viz.

LEASES FOR YEARS.

The remedy is by *EJECTIONE FIRMÆ*; or if by the reversioner, *QUARE EJECIT INFRA TERMINUM*.

In both which at this day, he recovers damages, and the possession of his term.

WARDSHIPS AND HOLDING OVER, for single or double value.

The remedy is *quare intrusit maritagio non satisfacto—ejectione custodiæ*; and against a stranger, a writ of right of ward.

TENANTS by stat. merchant, stat. staple, and *elegit*, though they have but chattels, yet the statute gives them remedy for their possession by assize.

I come to the rights of freeholds, and the wrongs done to them, together with an amotion of the possession: and those rights are of two kinds, viz.

Some only compatible to them that claim not only a freehold, but an **INHERITANCE**;

Some that are common to any that have a freehold **ONLY**:
And accordingly, their remedies will be severally diversified.
These wrongs are of several kinds, viz.

Abatement;

Intrusion;

Disseisin;

Usurpation;

Discontinuance;

Deforcement.

ABATEMENT is where one enters **AFTER** the death of the ancestor, **BEFORE** the heir enters.

The remedy is according to the nature of the descent from his ancestor,

By assize of **MORTDANCESTOR**;

Writs of **AILE, BESAILL, COSINAGE**.

INTRUSION is an entering or continuing in possession after an estate **FOR LIFE** determined.

The remedy: he in the reversion or remainder may enter; or if his entry be taken away, has his writ of **INTRUSION**.

DISSEISIN is a large title, and is an unlawful **ENTRY AND**

oustering him that has an ACTUAL seisin and freehold.

And it is either,

With force : in which case the party disseised has his remedy, either,

By writ of FORCIBLE ENTRY upon the stat. 8 H.6. to recover the possession and damages.

By assize of NOVEL DISSEISIN to recover his possession, and damages ; and the party to be fined and imprisoned for his force.

By writ of ENTRY in nature of an assize, to recover his seisin and damages.

Without force : and for this he has remedy by assize, or writ of entry, ut supra.

Now both these disseisins are either of

Things incorporeal, or

Things corporeal.

Of disseisins INCORPOREAL: This is not always a disseisin at the election of the freeholder.

And disseisins of inheritances INCORPOREAL are various, according to the various kinds of incorporeal inheritances ; as,

Commons ;

Profits appendre in another's soil ;

Offices ;

Tithes ;

Rents by rescue ;

Replevin ;

Enclosure ;

Denial.

Disseisin of corporeal inheritances are of two kinds :

With an ACTUAL ouster, as is requisite between

Jointenants,

Parceners,

Tenants in common.

Without an actual ouster, even by the disseisee's waving of possession upon an entry made.

And all these kinds of disseisins are done either to the party himself, or to his predecessor or ancestor.

And the remedy is,

By writ of entry **SUR DISSEISIN**.

And these writs of entry **SUR DISSEISIN** are either,

In nature of an assize against the first disseisor ; or in the degrees ; as in the **PER**, or **PER ET CUI**, against the feoffee of the disseisor or his feoffee. Or,

They are in the **POST** ; when the degrees are spent, or when the tenant comes in under the disseisor in the **POST** ;

As the lord **BY ESCHEAT**, &c.

And this learning of disseisins, of assizes, and of entry sur disseisin, are large and comprehensive titles, and of great variety and extent.

USURPATION : this title refers only to advowsons ; where one that has no right to present, presents to a church, and his clerk is admitted and instituted, and continues in by six months.

The remedy is by **WRIT OF RIGHT OF ADVOWSON** for the patron in fee-simple.

And this also takes in all the learning of advowsons, and the provisions made by the stat. West. 2. to save the right of **POSSESSORY** actions against usurpation ;

Where it is upon the predecessor :

Where it is upon the ancestor **IN TAIL** :

Where upon tenant for life, guardian in chivalry, &c.

DISCONTINUANCE : this is where he that **ALIENS** has not the **FULL** right, yet it puts the party injured thereby to his **REAL** action ; as in these instances, viz.

When the alienation is by tenant in tail, the remedy is, for the heir in tail, by formedon ^{Co. Lit. 326 b.} **IN**

DESCENDER ; for the reversioner, by formedon **IN REVERTER** ; and for the remainder man, by formedon **IN REMAINDER**.

When the alienation was by the husband seised in right of the wife, at common law the wife was driven to her **CUI IN VITA** ; in or out of the degrees, as the case fell out.

But now she may enter, **UNLESS A DESCENT BE CAST**, after her husband's death, by the statute **11 H. 7.**

When it was by a bishop, &c. aliening without the assent of the dean and chapter at common law, his successor was driven to his writ of entry *SINE ASSENSU CAPITULI*. But this is remedied by stat. 1 & 13 *Edw. I.*

The learning of discontinuances is also very curious ; as,

Who may discontinue ; who not.

What shall be a discontinuance, and what not.

And as the learning thereof is ample, so is that of the remedies thereof, by *FORMEDON*, &c.

DEFORCEMENT : and this is a larger, and a more comprehensive expression than any of the former ; for a disseisor, abator, intruder, discontinuer, usurper, and those that claim under them by feoffment or alienation, are all deforcers. But the proper application of the word is to such a person, who, though he has not a just right, has yet recovered against, or **BARRED HIM THAT HAS THE TRUE RIGHT** ; either,

By **DEFAULT**. And then the remedy for the party so deforced is,

If he had only a particular interest, by **PER QUOD EI DEFORCEAT**.

If he were issue in tail of him that so lost, by **FORMEDON**.

If tenant in fee-simple, or his heir, by **WRIT OF RIGHT**.

Or in a real action of an inferior nature ; as writ of entry, &c. and then,

Of the issue in tail of him that so lost, or is barred.

The remedy is, by **formedon IN DESCENDER**.

Of the tenant in fee-simple that so lost, or is barred. The remedy is, by **writ OF RIGHT (n)**.

(n) Since the disuse of real actions the proceeding by **EXCEMENT** is become the common mode of trying titles.

SECT. XLIV.

Of wrongs that have THE COUNTENANCE of legal proceedings of Courts.

HITHERTO I have proceeded in examining wrongs done by parties themselves: I now come to consider of wrongs done BY COURTS, or THEIR OFFICERS, in relation to legal proceedings.

And they are of two kinds, viz.

When the court proceeds in a cause whereof they have NO jurisdiction.

When they proceed in causes whereof they have jurisdiction, but proceed ERRONEOUSLY.

The former of these is a wrong, and the party has his remedy or relief therein ;

By NOT submitting to the sentence or judgment, and bringing his action against them that EXECUTE it :

By PROHIBITION from a SUPERIOR court; as when an ecclesiastical court proceeds in a cause of temporal conuzance ; or an inferior court, that has a LIMITED jurisdiction, holds plea of a thing done OUT of its jurisdiction.

The latter is when they proceed erroneously, or by committing some mistake in a matter within their jurisdiction.

This I call a wrong ; not that the party that supposes himself injured has any remedy against THE COURT, or THE JUDGE that thus proceeds ; for if men should suffer barely for error in judgment, when there is no corruption, no person would be judge in any case. But I call it a wrong, because, in truth, THE PARTY HAS A RIGHT TO BE RELIEVED against such a judgment : and,

In causes ecclesiastical or maritime, the law has provided a relief against an erroneous judgment,

BY APPEAL to other judges.

In causes of common law conuzance, errors or mistakes in judgment are REVERSED.

In courts NOT of record, as county courts, and courts baron,

By writ of FALSE JUDGMENT.

In courts of record, wherein error may happen divers ways, viz.

By error of the jury in giving a false verdict :

The remedy is by ATTAINT (o).

By error or disceit ; if the sheriff returns a party as summoned when he was not, whereby judgment is against him by default :

The remedy is by WRIT OF DISCEIT.

By error of the court. And then

The remedy is,

Writ of error in a SUPERIOR court,

AUDITA QUERELA.

And here may come in the learning of writs of error, and *audita querela*.

(*) The practice of setting aside verdicts UPON MOTION, and granting NEW TRIALS, has long superseded the remedy by " ATTAINT."

SECT. XLV.

Concerning REMEDIES, and the method of obtaining them.

IN the former Sections I have considered of the various kinds of wrongs or injuries, and under those distributions have mentioned their ordinary remedies, and thereby have much contracted this title ; wherein I shall only give some GENERAL RULES relating to the manner of the application of those remedies ; leaving every particular remedial writ, together with the process belonging to it, to be considered and digested under their several titles in the former Sections.

Remedies for wrongs are according to the nature of those wrongs, viz.

Ecclesiastical :

Civil.

Ecclesiastical remedies are such as are applicable to wrongs of ecclesiastical cognizance, and take in or include these two generals, viz.

The courts or places where the said remedies are to be had ;

The process preceding judgment and execution relating thereto.

Civil or temporal remedies are such as concern either,

Maritime injuries ;

Military injuries :

Civil or common law injuries.

In reliefs or remedies for maritime injuries, are considerable,

The court of relief : the ADMIRAL COURT.

The process preceding sentence, &c.

In remedies for military affairs, or matters of arms and honours,

The court is the court of honour, or military court.

The process, sentence, and judgment.

Now of little use.

SECT. XLVI.

*Remedies at common law. And first, of those WITHOUT
SUIT.*

THE law in many cases provides a remedy WITHOUT SUIT, which in general is either,

By act of the party ;

By act in law.

Remedies allowed by the party's OWN ACT, are in reference,

To things personal ;

To things real.

In reference to things personal :

If another does wrongfully take or detain my goods, my wife, my child, or my servant, I may lawfully **RETAKE** them again, if I can, so I do it not riotously.

So I may defend myself, or them, by force, if assaulted.

In reference to things real :

In these and some other cases, the law allows a man a remedy without being driven to it, viz.

In cases of **NUSANCE** done to my freehold, I may **REMOVE** them, if I can, without riot ; as,

To remove an obstruction out of my way.

Or the over-hanging of another man's house over mine.

Or the obstruction of water running to my mill.

In cases of **RENTS**, I may distrain the goods or cattle that are *levant et couchant* upon the tenement charged therewith.

And so in cases of **CATTLE DOING DAMAGE** upon my ground,

I may distrain **UPON MY GROUND** *damage feasant*. And so I may distrain cattle that are sold for my toll.

In reference to **LANDS**,

I may distrain, and maintain my own possession against any person that would eject or disseise me.

Where I have a right or title unto lands, and my entry not taken away, I may gain the possession by my entry.

And this necessarily draws into examination these two things, viz.

TITLES of entry ; which are either by breach of a condition **IN FACT**, or in **LAW** annexed to an estate that I have parted with, or my ancestor.

And here comes in, **OF CONDITIONS** ; what are good, and whom not ; when and to whom it gives an entry ; and how destroyed or suspended.

RIGHTS of entry : and this lets in all those considerations that concern titles of entry congeable,—of descents that toll entry, or continual claim,—of avoiding descents by infancy, by stat. 34 H. 8.

But regularly,

In personal things **IN ACTION**, as for debts, or covenants, or promises ; or,

As to **RIGHTS** of real things, where the entry is by law taken away,—the party **CANNOT** be his own judge, but must have recourse to the courts of common justice, except in the cases following, viz.

By act **IN LAW**, in some cases without suit, the party shall have remedy, where by his own act he cannot ; as,

In things personal ; as if the debtor make the debtee executor, **HE** may pay himself.

In things real ; as where a man's entry is taken away ; as by descent, or by discontinuance ; yet if he come to the possession without folly or covin, he shall be **REMITTED**.

And here all the curious learning of remitters comes in.

SECT. XLVII.

Concerning remedies at common law BY SUIT.

HITHERTO concerning wrongs and injuries in relation to things both real and personal, and remedies for the same without suit ; I now come to consider of remedies **BY SUIT**, and the means or method of their application.

Remedies by suit seem to be of two kinds ;

Such as the parties provide for themselves by mutual consent ;

Such remedies as the law provides for them.

Remedies that parties provide for themselves are of two kinds :

By their own immediate accord :

By transferring the decision of it to others.

The former of these, viz. the **IMMEDIATE CONSENT OF THE PARTIES**, is that which in law is called **AN ACCORD** ; which, **WITH SATISFACTION ACCORDINGLY MADE**, is in some cases of personal injuries a bar to any other remedy.

6 Co. And this lets in the learning of accords and concords ;
p. 44. what are good, and what not ; where they are a bar, and where not.

The latter of those, viz. the transferring the decision to **OTHERS** ; which,

If to two, or more, is called an **ARBITRAMENT** :

If to one, an **UMPIRAGE**.

And here the large learning of arbitraments and awards ; what a good submission ; what a good award, or not ; what remedy upon it ; when and where it is a bar in personal actions, &c.

Secondly, such remedies as the law provides are also of two kinds, viz.

Such remedies as the law provides without suit ; whereof before.

Such remedies as the law provides in the courts of justice, **SETTLED BY LAW**, and according to those constitutions touching actions and suits, that the law has provided and instituted.

And this takes in these considerations, viz.

The courts of judicatories, established by law, for recovering of rights, and redressing of wrongs.

The remedies themselves BY CERTAIN WRITS instituted by law, and applicable to those several wrongs.

The prosecution or pursuit of those remedies in the said courts.

The first of these concerns the large learning of the jurisdiction of courts. And forasmuch as there are several entire tracts written thereon, and I have before touched upon them, I shall here forbear to say any thing further herein ; only that that learning may with reason enough be transferred hither, at least some particulars thereof.

The second, touching the natures and applications of those remedies, I have in the former Sections, under every several kind of wrong or injury, mentioned the respective remedy, and therefore shall not again repeat it here.

The third, which is the prosecution, or pursuit, of those remedies, is the business of this division.

But before I enter upon that matter, I shall premise these two things, viz.

First, that the best way to meet with all the titles of the law in this business, will be to pursue the same in the order and method of the proceedings themselves, without any other distribution.

Secondly, that there are some things wherein the pursuit of a real suit and personal do differ ; as in the PROCESS, the JUDGMENT, and the EXECUTION. In most other things they agree ; or, at least, the pursuit of a real action contains all the general learning of a personal action, and much more.

Where therefore there is a signal difference, I shall observe it by the way, without running through the whole procedure of a real and personal action distinctly ; and shall only here observe, that the general parts of a suit are these :

The process.

The pleading.

The issue.

The trial.

The judgment.

The execution.

The appeal.

SECT. XLVIII.

Of process and appearing.

FIRST, where a wrong is done, or a right detained, the party injured is to make his application or suit for that remedy which the law ordains; and in order thereto, to take out such writ or process as the law, on the circumstance of his case, requires.

The common, usual, ordinary process are as follow :-

In personal actions,

Summons, attachment, distress, *capias* (p), *alias*, *pluries* & *exigent*, and in some it begins with attachment.

In real actions,

It is summons, *grand cape*, and judgment; or AFTER appearance, *petit cape*, and judgment.

In mixed actions,

In assizes,—attachment; and upon default, the inquest taken by default.

In waste,—attachment and grand distress, and an enquiry of the waste, &c.

Every process gives the defendant a day in court; and this lets in these several things, viz.

JOUR IN COURT, and the variety of it.

And incident to this, is,

Adjournment; and,

Discontinuance.

And at that day, or *jour in court*, the defendant or tenant either appears, or not appears.

Here of appearance, and its diversity;

By guardian, or *prochein amy*;

By attorney;

In person.

(p) The *CAPIAS*, generally speaking, is peculiar to the court of common pleas; the ordinary process, in personal actions, in the court of king's bench, being the bill of Middlesex, and the *latitat*, *alias latitat*, &c. The ordinary process in the exchequer office of pleas, are, *quod minus ad respondendum*, *subpoena ad respondendum*, *venire facias ad respondendum*.

If there be not an appearance,
 Either a DEFAULT is made :
 And here of the process upon default ;
 In personal actions ;
 In real actions.
 Or there is AN EXCUSE of appearance,
 And therein *saver default* ;
 By protection ;
 By essoin prayed.
 And here all the learning of essoins ;
 Their nature,
 Mirror, c. 5. § 1. Their diversity : as,
 Common essoins,
 Service le roy, &c.
 On the other side, as to the plaintiff.
 The plaintiff either appears ; or,
 Makes default, and thereupon a non-prosecution.
 And here of the nature and variety of
 Nonsuits ;
 Retraxit, &c.

SECT. XLIX.

Of PLEADING.

SECONDLY, I come to pleading.
 If both parties appear, the plaintiff declares of counts.
 And here of,
 Counts,
 Declarations.
 And the defendant or tenant's part is after imparlance TO
 PLEAD.

And such plea is either,

Dilatory ; or,

To the matter or right of the complaint.

Dilatory pleas are of several sorts :

To the JURISDICTION of the court :

From the place where the suit arises ;

From the thing in controversy, as, ancient demesne. Or,

To the impotency, or NON ABILITY of the plaintiff, which is very various ; as,

Alien { *Amy.*
 { *Enemy.*

Outlawry { In personal actions.
 { For felony.

Excommungement.

And formerly villenage. And,
Professed.

In ABATEMENT ;

And this either,

Of the count.

Of the writ.

VIEW DEMANDED.

And this a large title.

AID PRAYED ;

Of the king :

And here of *rege inconsulto, procedendo.*

Of a common person.

And here of AID.

The different kinds of aid ; as,

Of the reversioner or remainder-man.

Of the patron and ordinary.

VOUCHER : which is a very large title.

And here of voucher ;

In what action ;

Of what person.

Counter-plea of voucher.

Process against vouchee.

Pleading of vouchee.

Recovery in value.

AGE PRIER :

For minority of the demandant.

For nonage of the tenant.

And here of prier in aid of vouchee, &c.

And all the learning of age.

And herein comes also, what and when pleas dilatory are peremptory,

After demurrer ;

After trial :

And of pleas in abatement AFTER THE LAST CONTINUANCE.

Pleas that go to the right or MERIT of the complaint, are of two sorts ;

First, pleas TO THE ACTION, which DENIES the SUBSTANCE of the complaint :

And commonly make either,

A GENERAL issue ; as,

In trespass,—not guilty ;

In debt upon a contract,—*nil debet*.

In *assumpsit*,—*non assumpsit*.

In assize,—*nul tort, nul disseisin*.

In dower,—*nunquē de seize de dower*.

In a writ of right,—that the tenant has more right to hold, than the demandant has to demand.

Or a COMMON issue ; as,

In debt on bond, or action of covenant,—*non est factum*.

In an assize of *mortdancestor*, *aiel*, *besaiel*, &c. that the ancestor was never seised.

Secondly, pleas IN BAR : these are very various and different, according to the several kinds of the tenants or defendants case.

And lets in all the learning of bars, &c. as,

Bars are either such as are,

PROPER.

COMMON.

Pleas in bar are therefore considerable,

In their nature or matter.

In their qualities or manner of pleading.

Bars according to the nature of the action, and case of the parties, are very various and different ; and therefore here all the learning of such bars comes in, yet somewhat concerning them follows.

Proper bars are,

Such as are applicable only to **REAL** or **MIXED** actions ; as,

Fine ;

Feoffment ;

Release of right ;

Warranty, &c.

Of the plaintiff ;

Or his ancestor.

Such as are proper to **PERSONAL** actions only ; as,

Accord with satisfaction ;

Arbitrament ;

Performance,

Of the condition,

Of the bond.

Such bars as are common to both, yet diversified oftentimes with such diversifications as are applicable to the nature of the action ; as,

RELEASE of action.

LIMITATION of time by act of parliament elapsed.

ESTOPPELS ;

And here of the several kinds of estoppels :

By matter OF RECORD.

By matter IN PAIS ; as,

Deeds indented or poll.

And here of the whole learning of estoppels :

For note, estoppels are not only the matter of bars, but of replications, rejoinders, and all other pleadings.

Concerning bars as to their qualities or manner of pleading, the same common rules of pleading for the most part concerns all kinds of pleading.

And therefore I shall here shortly insert them once for all, viz.

That the plea be SINGLE, and not double.

And here of double pleas.

That it have convenient CERTAINTY of time, place, and persons.

That it ANSWER the demandant's or plaintiff's count or plaint.

That it be so pleaded, that it may be TRIED.

When the defendant has pleaded, what next follows is, the plaintiff or demandant's answer to the defendant's plea ; and this is called a REPLICATION.

And here of the general rules, &c. of replications, viz.

That it be,

CERTAIN ;

SINGLE :

ANSWERING THE BAR, &c.

And this replication either,

DENIES or TRAVERSES the bar or plea of the defendant ;
and THEN AN ISSUE IS TENDERED, which regularly must
be joined in by the other party, and then the parties are at
issue.

And here all the learning of TRAVERSE ; what is traversa-
ble, or not ; how it must be made, either simply without
an inducement, or with an inducement ; and concluding
ABSQUE HOC to the matter alleged by the defendant.

Or CONFESSES AND AVOIDS.

And here all the learning of confessing and avoiding ;
and then there is NO issue offered by the replication : but
possibly the pleadings run on to surrejoinder, rejoinder,
rebutter, or surrebutter.

For if the plaintiff replies so as no issue be offered, this
gives occasion to the defendant to REJOIN.

And here of rejoinder, and how he must MAINTAIN his bar,
and NOT DEPART from his plea.

And here of DEPARTURE IN PLEADING.

SECT. L.

Of ISSUES.

THUS far of pleading. Now by this time either by the plea, re-
plication, rejoinder, &c. the parties are descended to AN ISSUE,
viz. to something AFFIRMED by the one party AND DENIED by
the other ; which affirmation and denial is called AN ISSUE : for
now the parties have no more to do, unless a matter happen to
EMERGE AFTER issue joined, and the last continuance.

[P]

This, if it be pleaded, is called a plea *PUIS LE DARRERIN CONTINUANCE*.

So that their business being at issue, they have no more to do but to expect the trial and determination of that issue.

Now issues are of these kinds, viz.

An issue joined upon a matter of LAW, which is to be determined by THE COURT.

And this issue is called a DEMURRER.

An issue OF FACT, which is of two kinds ;

An issue joined touching a matter of RECORD, on *nul tiel* record pleaded, &c.

An issue joined touching a matter IN PAIS ; as,

Whether such a deed were made.

Whether such a feoffment were executed, &c.

SECT. LI.

Of TRIALS.

AND now issue being joined between the parties, they have no more to do but to expect the trial of that issue ; and for that end they have DAYS OF CONTINUANCE given. Vide Co. 9. fol 30.

Here of continuances, &c.

Trials are of several kinds, according to the nature of issues, and the several appointments and directions of the law touching the same, viz.

Trial BY RECORD ; as,

When issue is joined, whether there be any such record or no.

Trial BY INSPECTION ; as,

Upon error to reverse a fine levied by an infant ; or in *audita querela* to avoid a recognizance acknowledged during his minority.

Trial BY PROOFS ; as,

Where issue in dower is, whether the husband be living or not.

Trial by EXAMINATION ; as,

Where an action of debt upon account is brought for things not lying in account.

Trial by CERTIFICATE :

Of the constable and marshal, whether the party be in service.

Of the bishop, by mandate from the secular court, as in case of general bastardy.

So of issues upon the right of marriage between the parties to the suit.

So of plenarty by institution into churches.

Trial BY BATTLE.

In appeals.

In a writ of right.

Trial BY JURY (q).

And this takes in a large field of learning.

Trials by jury are,

Extraordinary.

Ordinary.

Extraordinary : in writ of right,

In attain. *Quare Appeals.*

Ordinary ; by **TWELVE MEN.**

Wherein consider ;

The **PROCESS** to bring in the jury,

In C. B.—by *venire facias & habeas corpus.*

In B. R.—by *venire fac' & distringas juratorum.*

The **TALES** for want of a full jury appearing.

CHALLENGES of all sorts ;

To the array :

To the polls.

The **OATH** of the jury.

The **EVIDENCE** to be given to the jury ;

What allowable to be given ;

And when.

Co. Lit.

p. 227. b. **VERDICT** of the jurors :

(q) To the several kinds of trial enumerated by Sfr Matthew Hale may be added "trial by wager of law."

General verdict.

Special verdict.

What DEFAULTS or miscarriages impeach the verdict.

The POSTEA, or return of the verdict by the judges of *nisi prius*.

SECT. LII.

Of JUDGMENT.

THE fifth act in this business of prosecution or suit, is judgment.

And here the whole learning of judgment comes in, viz.

What shall be sufficient TO STAY judgment.

And herein,

Of arresting judgments.

Of reversing judgments.

Upon what it is given; which for the most part is upon these premisses or precedents.

Upon DEFAULT, after default; as in real actions after the grand distress in,

Waste;

Quare impedit.

Upon CONFESSION,

Nihil dicit;

Non sum informatus.

Upon DEMURRER.

Upon TRIAL of the issue, according to the various methods of trial above mentioned.

The several kinds of judgments.

In suits real.

In suits personal.

INTERLOCUTORY, and not final; as,

Awards upon the writ affirmed, or other dilatory pleas, where the judgment in many cases only is,

Respondeat ouster.

FINAL, but NOT complete :

And that either,

Incomplete IN PART, but complete in the residue ; as,

Where the judgment is given for the thing demanded, but the damages not yet inquired of.

Incomplete in THE WHOLE ; as,

Where a judgment is given for the party to recover his damages, where the damages are the principal ; wherein,

The complete judgment is not given till the writ of inquiry returned.

FINAL and complete, with respect to the action upon which it is given.

Final, not only as to the action upon which it is given, but to all other actions touching THAT thing ; as,

Judgment final, in a writ of right after the issue joined, &c.

The forms of entry of judgments.

SECT. LIII.

Of EXECUTION.

THE sixth act in this business of suit, is execution ; which
Is a great field of learning.

Executions seem to be of two kinds.

Within the year.

After the year.

The former of these is also of two kinds :

In reference to LANDS recovered.

In reference to DEBTS or DAMAGES recovered.

First, in relation to lands recovered, two things are considerable ;

The writ or mandate of execution.

The execution of the said writ.

Touching the former ;

The writ of mandate itself is of two kinds, in relation to the ESTATE recovered ;

If a FREEHOLD,—*hab' fac' seisinam*.

If a CHATTEL,—*hab' fac' possessionem*.

I do not here meddle with the executions of other kinds of writs, as *quod permittat*, *replevin*, &c. because they may come in in the former section, where the writs themselves are mentioned, and they are various.

Touching the latter ;

In the execution of the writ is considerable :

The officer that is to make it.

And here of the office of sheriff ;

The manner of his making ;

His power ;

His duty in making returns, &c.

The manner of doing it.

And here of the POSSE COMITATUS.

Sed vide ante, of Sheriffs, Sec. 12.

In reference to debts or damages recovered, there are also considerable ;

The nature of the process :

The manner of its execution.

The PROCESS is of the following kinds :

And so are the methods or manner of the execution.

(N. B. They are herein joined together.)

The BODY only,—by *capias ad satisfaciend'*.

And here of *capias* :

Where it lies ;

How executed ;

When with, and when without, breaking open doors.

What kind of execution it is ;

Whether without satisfaction.

And here of NON OMITTAS :

As also of escapes.

GOODS only,—by *fieri facias*.

And here of that learning :

How, upon what, and by whom, it is executed.

And whether a return be necessary.

PROFITS OF LANDS only,—by *levari facias*.

And here of that:

What profits shall be levied ;
 And whereupon.
 PART of the LANDS, and ALL the goods,—by *elegit*.
 Here of *elegit*.
 Where it lies.
 What lands extendible ;
 How the extent shall be made ;
 How returned ;
 And where a re-extent.
 BODY, LANDS, AND GOODS,—by extent upon a stat. merchant, or stat. staple, or a recognizance in nature of a stat. staple.
 And here of these executions.
 What they are ;
 The manner of executing the same, &c.
 Touching executions after the year past ;
 When the proceeding is,
 To REVIVE the judgment. And,
 Obtain execution thereof ;
 By SCIRE FACIAS.
 And here all the learning of *scire facias*.

SECT. LIV.

Of redress of injuries, BY ERROR, &c.

LASTLY, I come to remedies that persons have, to be relieved against the proceedings aforesaid, in case they have just cause so to be.

And they are these, viz.

BY WRIT OF ERROR ; to remove the record into a SUPERIOR court, to examine the errors, in case the inferior court has erred in point of proceeding, judgment, or execution awarded.

And here comes in that great title Error, with its adjuncts and appendixes, viz.

Where it lies ;

When it lies :

In what court.

When 'tis a *supersedeas*, &c.

What assignable for error.

The process to bring in the party that recovered.

The judgment therein, both,

When the former is affirmed ; and,

When it is REVERSED.

Execution of judgment upon the affirmation or reversal :

And here of EXECUTIONS in error.

By writ of ATTAINT, where the jurors give a FALSE verdict.

And here all the learning of attaints.

By writ of DISCEIT, where the judgment is by default, and the party never duly summoned.

Where the party has lost by DEFAULT in a REAL action, yet has good right, when yet by reason of his default, he did not shew it, viz.

By writ of right for him that lost by default, or his heir, having a FREE-SIMPLE.

By writ of *quod ei deforceat*, if he had only an estate for LIFE, or in TAIL.

By *formedon in descender, reverter*, remainder. Vide ante.

And here at large the learning of FAUXIFIER DE RECOVERY.

Where the party is put out BY EXECUTION, wherein he had no day to plead or answer, as in executions by *capias*, *alegit*, statute merchant, &c.

By AUDITA QUERELA.

And here of the whole learning of AUDITA QUERELA.

And thus far of the partitions of the titles of the laws of England, and the Analysis thereof, in relation to rights, &c. of a civil nature.

As to pleas of the crown, and matters criminal, that should here ensue, they are already drawn up, or perfected by me, in a short tract, OF PLEAS OF THE CROWN, which I shall add to this in due time.

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